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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

HARFORD COUNTY, MARYLAND,
Petitioner,

v.

CHESAPEAKE B & M, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

DIANE THERESA SWINT
Assistant County Attorney
Counsel of Record
ERNEST A. CROFOOT
County Attorney
JEFFERSON L. BLOMQUIST
Deputy County Attorney
220 South Main Street
Bel Air, Maryland 21014
(410) 638-3205
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Must a county ordinance provide for prompt judicial review in order to satisfy the free speech requirements of the First Amendment when the ordinance confers only ministerial discretion upon the licensor and is designed to protect the health, safety and welfare of its citizens by minimizing the undesirable secondary effects generally associated with an adult bookstore?

2. If the county ordinance must expressly provide for prompt judicial review, is that requirement satisfied if the ordinance affords a prompt exit from the administrative licensing system and an avenue of immediate appeal of that decision to the judiciary, or must the ordinance also provide for prompt completion of the judicial process in order to satisfy the procedural safeguards required under the First Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Harford County, Maryland (the "County") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit (App. 1a) is reported at 58 F.3d 1005. The opinion of the U.S. District Court for the District of Maryland (App. 38a) is reported at 831 F. Supp. 1241. The opinion of the district upon the Respondent's Motion to Amend the Judgment (App. 57a) is unreported.

JURISDICTION

The Fourth Circuit, sitting *en banc*, entered its judgment on July 5, 1995 (App. 1a). The jurisdiction of this

Court is invoked under 28 U.S.C. § 1254(1) (1988 & Supp. V 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the rights of the people to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The First Amendment is made applicable to the states through the Fourteenth Amendment.

Bill 92-27 as enacted by the County Council of Harford County, Maryland is set forth in full in the appendix to this Petition for Writ of Certiorari. (App. 62a.)

STATEMENT OF THE CASE

A. Factual Background.

On May 11, 1992, the Harford County Council enacted Bill 92-27 to protect the health, safety and welfare of its citizens by minimizing the undesirable secondary effects of adult bookstores whose business is to sell or to rent sexually explicit materials and to provide sexually oriented entertainment. (App. 2a, 20a, 42a-43a.) The purposes of the licensing, civil disability, design, zoning and penalty provisions of the ordinance are to minimize the unlawful sexual activity, the transmission of sexual diseases, and the more general crimes associated with adult bookstores and to reduce the adverse impact to property values and to the quality of life in their surrounding areas. (App. 2a, 20a-21a, 42a-43a.) The ordinance is a content-neutral "time, place and manner" regulation

which confers only ministerial discretion on the County (i.e., the licensor) to deny a license to a qualifying adult bookstore. (App. 18a-19a, 45a-46a.)

Respondent, Chesapeake B&M, Inc., t/a Highway Craft, Gift & Book Store ("Chesapeake B&M"), is one of the four adult bookstores which was in operation in the County when the ordinance became effective on July 10, 1992. (App. 4a-5a.) Chesapeake B&M never applied for a license pursuant to the ordinance and, pending the outcome of this case, the County has not applied the ordinance to Chesapeake B&M or to any other adult bookstore. (App. 5a, 40a.)

B. Procedural History Of This Case.

Chesapeake B&M did not apply for or obtain a license. Instead, Chesapeake B&M filed suit against the County in the U.S. District Court for the District of Maryland. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 (1988 & Supp. V 1993) and 1343 (1988), declaratory and injunctive relief were sought under 42 U.S.C. § 1983 (1988) and attorney's fees were sought pursuant to 42 U.S.C. § 1988 (1988 & Supp. IV 1992). The suit presented a broad facial challenge to the constitutionality of the ordinance, contending, among other things, that the ordinance imposed a prior restraint on protected speech without the requisite procedural safeguards.

Chesapeake B&M and the County filed cross motions for summary judgment. (App. 5a, 39a.) The district court generally upheld the ordinance. (App. 56a.) However, it found the licensing provisions were unconstitutional to the extent that they did not preclude the potential for indefinite delay and they did not expressly require a license to issue in the event an administrative agency requested or required to submit information to the licensor failed to do so within the time frames specified.

(App. 47a-48a.) An additional basis for the court's determination rested in the fact that the ordinance did not expressly require that the status quo of an applicant be maintained during the licensing review process. (App. 47a-48a.) Both of those shortcomings were corrected by an amendment to the ordinance. (App. 6a, 28a.)

Otherwise, the district court found that the ordinance did not fail to provide for prompt judicial review since it authorized an immediate appeal of the licensing agency's decision to the Maryland court with general jurisdiction to hear the appeal. (App. 51a.) It found that Chesapeake B&M did not have standing to challenge the inspection provisions and held that even if it did have standing, because a bookstore was a place of public accommodation, no Fourth Amendment expectation of privacy existed therefore the inspection provisions were constitutional. It ruled the disability provisions did not violate the constitutional prohibitions against *ex post facto* laws and bills of attainder. (App. 53a.) Finally, the district court held that the disability provisions did not violate the due process clause of the Fourteenth Amendment. (App. 53a.)

Chesapeake B&M filed a Motion to Alter or Amend Judgment which was denied. (App. 59a.)

Chesapeake B&M then noted a timely appeal to the U.S. Court of Appeals for the Fourth Circuit. Argument was held before a panel of the Fourth Circuit, and the panel voted to affirm. However, the panel withheld publication of an opinion in view of the potential conflict with *11126 Baltimore Boulevard, Inc. v. Prince George's County, Maryland,* 32 F.3d 109 (4th Cir. 1994), a reported decision by a different panel of the court. (App. 7a.) The area of conflict concerned the applicability and the meaning of the phrase "prompt judicial review" as a procedural safeguard in an adult entertainment licensing system.

The Fourth Circuit issued an order November 2, 1994 vacating both panel decisions and scheduling both cases for rehearing *en banc*. The November 2, 1994 order stated that "the court has particular interest in the issue common to both cases of what is required to meet the requirement that 'expeditious judicial review . . . must be available,' *see, FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, [227, 110 S.Ct. 596, 606, 107 L.Ed.2d 603] (1990), and whether the ordinances involved in these cases meet that requirement." (App. 61a.)

Supplemental briefs were filed and argument was held on March 7, 1995. On July 5, 1995, the Fourth Circuit issued an opinion reversing in part, remanding in part (for a determination of severability) and vacating in part [1] the decision of the district court by a vote of ten to four. The majority found that the ordinance was unconstitutional in its failure to provide prompt judicial review, concluding that "prompt judicial review means a sufficiently prompt decision on the merits." (App. 12a.)

The dissent, in an opinion authored by Judge Niemeyer, concluded: first, the ordinance does not confer unbridled discretion upon the licensing agency and thus does not embody an unconstitutional prior restraint that requires the procedural safeguard of prompt judicial review (App. 18a); second, even if the procedural safeguard of prompt judicial review is necessary, only prompt access to a court, not swift completion of the judicial process, is required; and third, in any event, the Maryland Rules of Procedure provide the means to obtain a prompt judicial decision. (App. 20a.)

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[1] The Fourth Circuit vacated the portion of the district court's judgment relating to the disability and the inspection provisions in the ordinance and found that Chesapeake B&M did not have standing to challenge those provisions.

REASONS FOR GRANTING THE WRIT

There is a clear and direct conflict among several circuits of the Court of Appeals on the question of how this Court's requirement of "prompt judicial review" in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), is to be interpreted and applied. This case presents a timely opportunity to provide needed guidance to the conflicting and splintered courts below. The ability of local communities to regulate the undesirable secondary effects of sexually oriented businesses without running afoul of the First Amendment hinges on the resolution of the issue. The issue is one of continuing and increasing concern nationwide. The fact that in the past two years, two circuits, the Fourth and Seventh, have chosen to address this question *en banc* and have reached adverse conclusions further illustrates the importance of and the confusion about the issue.[2] The Fourth Circuit's resolution of this important issue is erroneous and must be rectified.

I. THE FOURTH CIRCUIT'S INTERPRETATION OF "PROMPT JUDICIAL REVIEW" IS IN DIRECT CONFLICT WITH THAT OF THE FIRST, FIFTH AND SEVENTH CIRCUITS AND AGGRAVATES THE EXISTING CONFUSION ON THE QUESTION.

This Court, in examining an adult entertainment licensing scheme in *FW/PBS* stated, in a plurality opinion, that "there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 228. What constitutes "the possibility of prompt judicial review" and when it is required

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[2] The *en banc* process is "consumptive of the court's resources" and thus "the matter or the issues involved must be of some uncommon import, implicating important policy matters or issues of wide-reaching effect." Niemeyer, *Inner Workings of the United States Court of Appeals for the Fourth Circuit*, in APPELLATE PRACTICE FOR THE MARYLAND LAWYER: STATE AND FEDERAL 61 (Paul M. Sandler & Andrew D. Levy eds., 1994).

has generated a great deal of uncertainty, controversy and confusion among the courts of appeals. Five circuits have addressed the question, two sitting *en banc*. Three circuits (the First, Fifth and Seventh) have held that the possibility of prompt judicial review means that prompt access to the judiciary must be available. Two circuits (the Sixth and now the Fourth) have found that a guaranteed prompt decision by the judiciary is required. The conflict involved is a direct, clear and specific one, not merely a conflict in principle or reasoning, and thus deserves and requires resolution by this Court.

In the case *sub judice*, the court below found that "prompt judicial review means a sufficiently prompt decision on the merits." (App. 12a.) The dissenting opinion, however, concluded that prompt access to the judicial system, not a guaranteed prompt judicial decision, was required and pointed out that "at least three other circuits share this view. *See Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993)." (App. 20a.)

Although the majority did not address this conflict in its opinion below, it did so in a footnote in its opinion in *11126 Baltimore Boulevard*, 58 F.3d 988 (4th Cir. 1995) (en banc), the companion case argued on the same day as the case *sub judice*. The court there acknowledged that the circuits are split on the question and that the Fifth Circuit in *TK's Video* and the First Circuit in *Jews for Jesus* have held that the requirement of prompt judicial review is satisfied by providing access to the courts after an administrative denial of a license. The court, although acknowledging the direct conflict, concluded that it found neither the First or Fifth Circuits persua-

sive on the question. *11126 Baltimore Boulevard,* 58 F.3d at 1000 n.17.

The Sixth Circuit addressed the question in *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc), *cert. denied,* 114 S.Ct. 1837, 128 L.Ed.2d 464. The fact that the *Graff* case produced two concurring opinions as well as a dissenting opinion further indicates the degree of confusion to be found on the question of prompt judicial review. In *Graff,* the majority opinion found that the requirement of prompt judicial review was satisfied through prompt access to the judiciary available through the common law writ of *certiorari* in Illinois. *Graff,* 9 F.3d at 1325. Judge Flaum, in a concurring opinion, concluded that when the ordinance at issue contained express and well defined standards and did not present the licensing agency with an opportunity to make decisions of direct First Amendment concern, a special provision for judicial review was not necessary. Similarly, Judge Ripple, in a separate concurring opinion joined by two other judges, felt that the requirements of *FW/PBS* did not apply to a licensing scheme which did not vest unfettered discretion in the licensing agency and thus the procedural safeguard of prompt judicial review was not required.[3]

Conversely, and adding to the conflict among the circuits, the Sixth Circuit, in *East Brooks Books, Inc. v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995), recently held that a Memphis ordinance which provided judicial review of the licensor's decision by way of Tennessee's writ of *certiorari* process was unconstitutional for its failure to provide prompt judicial review.[4]

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[3] Judge Niemeyer, in the case *sub judice,* expresses essentially the same view in part II of his dissenting opinion.

[4] The Memphis ordinance, however, may be distinguished from both the Chicago and Harford County ordinances in that it vested considerably more discretion in the administrative decision-maker

There is a direct conflict among the circuits on the question of when the procedural safeguard of prompt judicial review is required and whether the requirement is satisfied by prompt access to, rather than by prompt decision by, the judiciary. The appellate courts are struggling with this question and can only look to this Court for its resolution. That they are in need of and are seeking this Court's guidance can be seen in the language of the courts in their opinions on this issue. The Fourth Circuit, in *11126 Baltimore Boulevard,* concluded, "The questions presented are difficult, and there is little authority to guide our decision." 58 F.3d at 1001. The Sixth Circuit commented, "Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible." *East Brooks Books,* 48 F.3d at 225. Likewise, the Eleventh Circuit noted, "The [Supreme] Court, however, has not clarified exactly what type of judicial review is sufficient to fulfill this requirement . . . ." *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994). Finally, one of the concurring opinions in *Graff* left no doubt as to that circuit's desire for guidance from this Court, describing the question of prompt judicial review as "a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States" and later stating "there is a great need for clarification of standards in this area, and I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States." *Graff*, 9 F.3d at 1333, 1335. The conflict and confusion has only increased since the *Graff* decision in 1993. Additional circuits have

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because one of the grounds for denying the license was if the applicant "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." *East Brooks Books*, 48 F.3d at 223.

addressed the question and no consensus of opinion has emerged. Rather, there is clear disagreement both among the circuits and within the individual courts of appeals.

The conflict presented here is not simply a disagreement between two circuits. The concern is widespread, the question has been addressed by six circuits,[5] and a wide range of reasoning and result has been the outcome. The case *sub judice* provides this Court with the opportunity to address and resolve this thorny question.

II. THE QUESTION PRESENTED IS IMPORTANT.

The question presented here is important in several respects. It deals with a fundamental aspect of this country's jurisprudence, the First Amendment, and concerns an issue being addressed by local communities nationwide. Local communities have the right to protect themselves from the harmful secondary effects of sexually oriented businesses by appropriate and permissible regulation.[6] Unfortunately, the Fourth Circuit's decision requiring "prompt judicial review" of a licensing system that vests no discretion in the licensor and which can be satisfied only by a guaranteed prompt judicial decision leaves local governments powerless to fashion and enact any such ordinances.

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[5] The six circuits are the First, Fourth, Fifth, Sixth and Seventh Circuits as mentioned *infra* and the Eleventh Circuit in *Redner*, which addressed but somewhat skirted the issue by holding that the opportunity for indefinite delay in the administrative decision-making process constituted indefinite delay in accessing the judiciary or obtaining a judicial decision. *Redner*, 29 F.3d at 1502.

[6] This Court has a long tradition of placing decisions regarding sexually explicit material in the hands of the local community and has held that even the fundamental decision as to what material is obscene as opposed to that entitled to the protection of the First Amendment must be determined by reference to contemporary community standards. *Miller v. California*, 413 U.S. 15 (1973).

In Maryland and in most states, the power to license businesses and the power to zone has been conferred on local government. Likewise, local government has been granted the power to confer an appeal to the appropriate state courts of the licensing and zoning matters that are within its province. However, the courts are a separate and independent branch of the state, and the functioning of the courts remain within the sole and exclusive province of the state. Local government simply cannot dictate the time frames under which the state judiciary must act. The holding of the Fourth Circuit precludes local communities from protecting against the harmful secondary effects of sexually oriented businesses.

Further difficulty is engendered because of the disparity in the application of First Amendment principles among the circuits. Local communities in the First, Fifth and Seventh Circuits can regulate against the harmful secondary effects of sexually oriented businesses as long as the regulatory ordinances provide prompt access to the judiciary. Local communities in the Fourth and Sixth Circuits, and perhaps in the Eleventh Circuit, are for all practical purposes precluded from regulating against the harmful secondary effects.

There is no compelling reason to require prompt judicial review of a licensing system or a zoning system which is a content-neutral "time, place and manner" ordinance that does not confer the licensor or the zoning authority with unbridled discretion. In *Freedman v. Maryland*, 380 U.S. 51 (1965), which challenged a censorship statute that required the censor to render a decision based on content, this Court required a prompt decision by the censor and prompt judicial review of that decision. The plurality opinion in *FW/PBS*, which has not been construed with any clear consensus among the circuits, applied the *Freedman* prompt judicial review concepts to a licensing ordinance which vested the licensor with some degree of discretion because the ordinance did not expressly require a license to issue or to be denied within

a definite and prompt time limit. However, where such unfettered discretion is absent, this Court has recognized that the normal processes of judicial review are sufficient to ensure that a decision-maker has properly applied the review criteria clearly and explicitly delineated in the legislative system. *See*, e.g., *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American MiniTheaters, Inc.*, 427 U.S. 50 (1976). This Court needs to clarify whether an ordinance which is content-neutral, which merely confers ministerial discretion upon the licensor, and which protects health, safety and welfare by minimizing undesirable secondary effects is constitutional as long as it provides for a prompt exit from the administrative licensing system.

Moreover, this Court has completely reversed the economic incentives in place when *Freedman* was decided. Under *Monroe v. Pape*, 365 U.S. 167 (1961), a local government was not subject to suit for monetary damages for a policy that violated the constitutional rights of a sexually oriented business.[7] Thus, a local government could cripple a sexually oriented business through the application of a veiled censorship law without concern of exposure to a suit for monetary damages. This Court's decision in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), reversed *Monroe* and created a significant economic disincentive for a local government to attempt legislative censorship. This Court has expressly recognized the deterrent effect of its decision in *Monell*, noting:

> Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses,

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[7] While no case clearly prohibited a suit against a local official or employee for monetary damages for the infringement of a constitutional right, the law was not certain as to the breadth of recovery which could be obtained from a local official (*see*, e.g., *Moor v. County of Alameda*, 411 U.S. 693 (1973)), and the local official was generally entitled to qualified or to absolute immunity from suit.

> but to serve as a deterrent against future constitutional deprivations, as well. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systematic" injuries that result not so much from the conduct of a single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. (Citations omitted.) (Footnote omitted.)

Owen v. City of Independence, Mo., 445 U.S. 622, 651-52 (1980).

A local government which applies an ordinance ultimately found to violate a person's First Amendment rights is subject to suit for monetary damages and for attorney's fees under 42 U.S.C. §§ 1983 (1988) and 1988 (1988 & Supp. IV 1992). Thus, unlike in the era of *Freedman*, a local government today has a substantial economic incentive to carefully tailor any ordinance which may affect a sexually oriented business so that it does not infringe on any of that business's First Amendment rights.[8]

It is unwise and contradicts traditional notions of separation of powers to require the judiciary to complete its decision making process within a legislatively mandated

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[8] Chesapeake B&M already has filed a petition for attorney's fees following the *en banc* decision of the Fourth Circuit in this case. *See, TK's Video*, 24 F.3d at 712 (awarding attorney's fees to sexually oriented businesses that brought a partially successful facial challenge to a local licensing ordinance).

time frame. In Maryland, the state constitution purports to require the Court of Appeals to issue a written opinion within three months after argument or submission of a case to the Court. Md. Code Ann., Const. Art. IV, § 15 (1981 Repl. Vol.). The Court of Appeals has long held that this "requirement" is directory only. *McCalls Ferry Power Co. v. Price*, 69 A. 832, 838 (1908). The individual nuances of a case can never be forecasted. The judiciary, which has the burden of making the decision, should have the opportunity to make a reasoned and well researched decision, rather than a hurried decision precipitated by an arbitrary deadline.

There are many conventional means by which a court can protect a sexually oriented business's First Amendment right to disseminate presumptively protected speech without imposing a defined time frame within which the judiciary must render a final decision. A court can protect the interests of an ongoing business through a grant of injunctive relief. A court can protect the interests of a prospective business through granting a writ of mandamus requiring the issuance of a license if a local government unlawfully frustrates a prospective business through its licensing or zoning system. Again, because the owner/operator of a sexually oriented business can obtain attorney's fees for any successful facial challenge to an ordinance and compensatory damages and attorney's fees for any monetary loss arising out of the unconstitutional application of an ordinance, a local government has a clear incentive to facilitate and to expedite the judicial process and to acquiesce to injunctive or mandamus relief.

The question of the meaning and application of "prompt judicial review" as a procedural safeguard implicates fundamental constitutional concerns and involves an issue with which local communities throughout the nation are struggling. The case *sub judice* presents this Court with the opportunity to provide needed direction on an issue of wide-reaching concern and significant import.

III. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

The Fourth Circuit held that the Harford County ordinance was unconstitutional because it failed to guarantee a prompt judicial decision of a denial of a license by the administrative agency. The Fourth Circuit based its decision on its analysis of this Court's holding in *FW/PBS*. In *FW/PBS*, this Court found the possibility of prompt judicial review of the licensor's decision to be necessary in the event that the license is erroneously denied. However, this Court identified the two "evils" it found intolerable in a licensing system regulating a First Amendment protected business as: 1) unbridled discretion in the hands of a government official; and 2) failure to place limits on the time within which the decisionmaker must issue the license. *FW/PBS*, 493 U.S. at 225-26.

Neither of these "evils" is present in this case. The ordinance places no substantive decisionmaking discretion in the hands of the licensor and the question of the time within which the licensor must make his decision was addressed by the district court and promptly remedied by the County through an amendment of its ordinance.[9] Because the amended ordinance does not confer unbridled discretion upon the licensor to deny a permit to a qualifying adult bookstore, the procedural safeguards prescribed

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[9] This Court, in *FW/PBS*, 493 U.S. at 226-27, cautioned that a licensing system that fails to place time limits on when a licensor must issue a decision confers a form of unbridled discretion which triggers the need for *Freedman* procedural safeguards. Because the original ordinance, while requiring issuance or denial within 44 days, did not expressly state that a licensing decision would have to be made within that time frame if one of the agencies having input into the licensing system did not timely submit the information required by the ordinance to the licensor, the district court found that there was an element of unbridled discretion left to the licensor. The amendment cured that deficiency and provided for the maintenance of the status quo during the licensing determination.

in *FW/PBS* are not constitutionally required. Thus, the Fourth Circuit erred in holding that the ordinance must provide for swift judicial completion of the review of the licensor's decision.

Additionally, even if it were to be assumed that the safeguards prescribed in *FW/PBS* are required, they are adequately met by the ordinance. *FW/PBS* requires the "possibility of" or an "avenue for" prompt judicial review.[10] This possibility or avenue is provided by the provision in the ordinance that allows a license applicant to appeal immediately a denial to the Circuit Court for Harford County. (App. 83a.) Only prompt access to, not prompt completion of, the judicial review process is mandated by *FW/PBS*. It would be inappropriate (as well as impossible) for the legislative branch of a local government to order the state judiciary to perform its function and to reach a reasoned decision within a predetermined deadline, particularly where federal constitutional questions are involved.

Finally, the Maryland Rules of Procedure provide ample mechanisms for completing the judicial review process expeditiously should the need arise. The Maryland Rules provide mechanisms by which any time frame may be shortened upon motion. Maryland Rules §§ 1-204, 7-204(c), 7-206(d), 7-207(c) and 7-208(b) (1995). Additionally, a party may apply for an *ex parte* or interlocutory injunction (Maryland Rules §§ BB70, *et seq.* (1995)) or for mandamus (Maryland Rules §§ BE40, *et seq.* (1995)).

Consequently, the Fourth Circuit erred in finding that the procedural safeguard of prompt judicial review prescribed in *FW/PBS* is applicable to a local ordinance that vests no discretion in the local licensing official. Even if it is presumed *arguendo* that prompt judicial review is

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[10] Nowhere is the phrase "prompt decision" used in Justice O'Connor's opinion in *FW/PBS*.

required, the Fourth Circuit erred in finding that prompt judicial review means a prompt judicial decision rather than simply prompt access to the judiciary. Finally, the court erred in not finding that the Maryland Rules of Procedure adequately provided mechanisms by which a prompt judicial decision could be obtained. This Court should grant the County's petition to correct the error of the court of appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DIANE THERESA SWINT
Assistant County Attorney
Counsel of Record
ERNEST A. CROFOOT
County Attorney
JEFFERSON L. BLOMQUIST
Deputy County Attorney
220 South Main Street
Bel Air, Maryland 21014
(410) 638-3205
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1270

CHESAPEAKE B & M, INCORPORATED,
t/a Highway Craft, Gift & Book Store,
Plaintiff-Appellant.

v.

HARFORD COUNTY, MARYLAND,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Walter E. Black, Jr., Senior District Judge.
(CA-92-2049)

Argued: March 7, 1995

Decided: July 5, 1995

Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges, and CHAPMAN, Senior Circuit Judge.

OPINION

MICHAEL, Circuit Judge:

This 42 U.S.C. § 1983 case involves an adult bookstore's First and Fourteenth Amendment facial challenge to a Harford County, Maryland, ordinance that licenses and regulates adult bookstores. The district court held that the ordinance is an unconstitutional prior restraint on speech insofar as it fails to ensure that licensing officials will issue or deny a license within a reasonable time and fails to maintain the status quo for existing bookstores during the application process. The district court rejected the bookstore's other constitutional claims. The bookstore appeals, arguing that the district court erred in holding that the ordinance provides for prompt judicial review of licensing decisions, sufficiently fetters the discretion of licensing officials and is otherwise narrowly tailored. Our principal conclusion is that the County has not provided for prompt judicial review, and we reverse the district court's judgment on that issue. We do not reach the merits of the bookstore's other First Amendment claims.

I.

A.

On May 11, 1992, the Harford County Council (Council) enacted Bill No. 92-27, the Adult Bookstore Licensing Law (Licensing Law), to license and regulate adult bookstores, as defined in the Licensing Law. The Licensing Law was designed to protect the health, safety and welfare of the County's citizens by minimizing the undesirable secondary effects generally associated with sexually oriented businesses. The Council found that such businesses frequently are used for unlawful sexual activities, may facilitate the transmission of sexual diseases, contribute generally to crime, decrease property values and adversely impact the quality of life in their surrounding areas.

The Licensing Law makes it unlawful to operate an adult bookstore in the County without a license issued by the County's Department of Inspections, Licenses and Permits (Licensing Department). To get a license one must complete an application and disclose to the Licensing Department certain information, some of which is fairly personal. For example, an applicant must provide the name, address and date of birth of all employees who will work in the bookstore. If the applicant is a corporation, it must submit a copy of its articles of incorporation and bylaws and the name and address of each person holding at least a ten percent interest. The applicant must submit to a criminal background check. Additionally, the applicant must inform the Licensing Department whether the applicant, the applicant's spouse, any person with whom the applicant resides, any employee who will work in the bookstore, or any person who owns at least a ten percent interest in the applicant has been convicted for one of thirty-two Maryland crimes enumerated in the Licensing Law.

Once an application is received, the Licensing Department must request within seven days an inspection from the County's Health Department and refer the application to any governmental agencies that might have information relevant to the application. These agencies and the Health Department are supposed to report back to the Licensing Department within thirty days. Within the next seven days the Licensing Department must notify the applicant whether a license will be issued. Thus, the Licensing Law contemplates that the Licensing Department will grant or deny a license within 44 days after it receives an application.

The Licensing Department may deny a license for a variety of reasons. For instance, a license may be denied if an applicant bookstore fails a health inspection, or if the applicant, the applicant's spouse, or a person with whom the applicant resides has been convicted within the

preceding two years of one of the thirty-two enumerated crimes.[1] If a license is issued, it lasts for one year and may be renewed annually.

Once an adult bookstore is operating, the Licensing Department may suspend or revoke the bookstore's license for any reason that might serve as the basis for the initial denial of a license. In addition, the Licensing Department may suspend or revoke a license for a variety of other reasons, for instance, if the licensee or an employee of the licensee refuses to allow an inspection by government officials, or if within a one-year period at least two book store employees get convicted for one of the thirty-two enumerated crimes.

In addition to the Licensing Department's power to suspend and revoke a license, the Licensing Law contains a penalty provision. Those who violate any provision of the Licensing Law are guilty of a misdemeanor and may be fined up to $1,000 or imprisoned up to six months, or both, with each day of violation constituting a separate offense.[2]

B.

Chesapeake B & M, Incorporated, t/a Highway Craft, Gift & Book Store (Highway Craft), operates an adult bookstore in the County. It was one of four adult book-

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[1] Provisions that prohibit one from operating a sexually oriented business because of past crimes are commonly referred to as "disability provisions." Most of the thirty-two crimes listed in the Licensing Law involve either obscenity, sexual activity, or harm to children. However, some of the crimes listed do not appear to involve any of these concerns (e.g., bribery of a public official, intimidation of a juror, obstruction of justice, and copyright infringement).

[2] The Licensing Law contains a host of other, more familiar, regulatory provisions. For example, it prohibits adult bookstores from locating within 1,000 feet of certain places (*e.g.*, houses of worship), regulates the interior design of adult bookstores, sets out requirements for lighting and viewing booths, and prohibits sexual acts, the admission of minors and obscene performances inside adult bookstores.

stores in operation when the Licensing Law became effective on July 10, 1992. Adult bookstores in operation on that date had 45 days to apply for a license under the new law. Highway Craft did not apply, but filed this 42 U.S.C. § 1983 action on July 23, 1992, to challenge the Licensing Law under various provisions of the United States Constitution.

Highway Craft's complaint alleged that the Licensing Law violates the free speech clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, on the grounds that it is an impermissible prior restraint on speech and that it is not narrowly tailored to minimize the incidental impact on protected expression. Highway Craft further alleged that the Licensing Law's random inspection provision (adult bookstore operators must allow officials to inspect the bookstores whenever they are occupied or open for business) violates the First and Fourth Amendments, made applicable to the states through the Fourteenth Amendment. Finally, Highway Craft alleged that the Licensing Law's civil disability provisions violate the Ex Post Facto and Bill of Attainder Clauses. U.S. Const. Art I, § 10. The complaint sought declaratory and injunctive relief.

On the parties' cross-motions for summary judgment, the district court issued a memorandum opinion and order on August 25, 1993. With respect to Highway Craft's First Amendment challenges, the court concluded that Highway Craft had raised a facial challenge and that it had standing to do so. The court next concluded that the Licensing Law targets the noncommunicative aspects of protected speech, specifically the undesirable secondary effects associated with sexually oriented businesses, and therefore should be analyzed as a content-neutral time, place and manner restriction.

In the context of determining whether the Licensing Law is narrowly tailored to serve the County's substantial interest in eradicating the undesirable secondary ef-

fects, the district court shifted a prior restraint analysis. Citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), the court noted that a licensing scheme impacting protected expression must (1) impose adequate standards to guide the discretion of licensing officials, (2) ensure an administrative decision on the license application within a reasonably brief time during which the status quo is maintained, and (3) provide for prompt judicial review. The district court found the Licensing Law unconstitutional because it does not ensure a reasonably prompt administrative decision and fails to preserve the status quo for existing adult bookstores during the application process.[3] The County does not cross-appeal these rulings.[4]

The district court rejected Highway Craft's other constitutional claims, however. Of significance for this appeal, the court held that the Licensing Law does not vest licensing officials with unbridled discretion to suppress speech and that it adequately provides for prompt judicial review of licensing decisions.

Highway Craft appealed to this court, arguing that the Licensing Law (1) does not impose adequate standards to limit the discretion of County officials involved in the licensing process, (2) does not adequately provide for prompt judicial review, and (3) is not otherwise narrowly tailored to serve any substantial governmental interest. A

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[3] Specifically, although the Licensing Law purports to limit to 44 days the period for administrative review of a license application, the 44-day limit assumes that the Health Department and other agencies will report back to the Licensing Department within 30 days. The district court found, however, that the Licensing Law does not guarantee this. Consequently, any delay by the Health Department or other agencies could delay indefinitely the licensing decision. As for preserving the status quo, the district court found that the Licensing Law does not provide that existing bookstores may continue to operate during the application process.

[4] The County informs us that it has since amended the Licensing Law to correct the deficiencies found by the district court. The amendment is not before us in this appeal.

panel of this court heard argument on July 13, 1994, and decided, two-to-one, to affirm. However, the panel withheld publication of an opinion in view of the potential conflict with *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, No. 93-2151 (4th Cir. Aug. 12, 1994), a reported decision by a different panel on the meaning of prompt judicial review.

Because of the conflict between the panels, our court issued an order on November 2, 1994, vacating both panel decisions and scheduling both cases for rehearing en banc. The order explained that "the court has particular interest in the issue common to both cases of what is required to meet the requirement that 'expeditious judicial review . . . must be available,' *see FW/PBS, Inc. v. Dallas*, 493 U.S. 215, [227] (1990), and whether the ordinances involved in these cases meet that requirement." All issues, however, were open for reargument.

II.

A.

Although the County does not raise the issue, we must first determine whether Highway Craft may bring a facial challenge to the Licensing Law. The Licensing Law is directed at bookstores that sell non-obscene adult material and thereby engage in activity protected by the First Amendment. "[W]hen a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988). Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion. Also, as we note today in *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, No. 93-2151 (4th Cir. July 5, 1995) (en banc), unbridled discretion exists when a licensing scheme

lacks adequate procedural safeguards to ensure a sufficiently prompt decision. *See FW/PBS*, 493 U.S. at 223, 226-27 (plurality opinion) (citing *Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965)). Here, Highway Craft alleged that the Licensing Law fails to ensure expeditious decision making. The district court agreed, holding that "the ordinance lacks specific time limits" and "allows the Licensing Department to delay the process." *Chesapeake B & M, Inc. v. Harford County, Md.*, 831 F.Supp. 1241, 1253 (D. Md. 1993). Thus, a facial challenge is proper here. *See FW/PBS*, 493 U.S. at 223-24 ("where a scheme creates a '[r]isk of delay,' such that 'every application of the statute create[s] an impermissible risk of suppression of ideas, we have permitted parties to bring facial challenges" (citations omitted).

B.

The First Amendment standards implicated here are well established. A governmental entity may regulate sexually oriented businesses, including adult bookstores, in an effort to address the undesirable secondary effects associated with them. We treat such regulations as content-neutral because they are justified without reference to the content of the impacted speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). They generally will be reviewed under the standards applicable to content-neutral restrictions that impose an incidental burden on speech. *Id.* at 46-50; *Wall Distribs., Inc. v. City of Newport News, Va.*, 782 F.2d 1165, 1168 (4th Cir. 1986); *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (time, place and manner); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (expressive conduct). The key inquiry is whether the regulations (1) are narrowly drawn to serve a substantial governmental interest and (2) allow for ample alternative avenues of communication.

However, as we explain more fully today in *11126 Baltimore Blvd., supra*, licensing schemes directed at sex-

ually oriented businesses engaged in protected expressive activity pose special problems because of the risks of censorship and suppression associated with prior restraints on speech. When the government uses a licensing scheme, two procedural safeguards are required to ensure expeditious decision making: (1) definite and reasonable limitations on the time within which the licensor must decide whether to issue a license and during which the status quo must be maintained and (2) prompt judicial review.[5] In addition, such a licensing scheme must impose narrow and objective standards to limit the discretion of licensing officials. In this appeal Highway Craft argues that the Licensing Law is an unconstitutional prior restraint on speech because it neither provides for prompt judicial review nor imposes adequate standards to guide the discretion of licensing officials.

C.

Before we can address Highway Craft's claim that the Licensing Law constitutes an impermissible prior restraint, we must note the awkward posture of this case as it comes to us. Highway Craft is appealing certain rulings of the district court relating to the constitutional adequacy of the licensing scheme. Yet at first glance it appears that Highway Craft won below. The district court held that the licensing scheme fails to ensure an administrative decision within a reasonably brief time, and the County is not cross-appealing that ruling. As a general rule a prevailing party cannot appeal from a district court judgment in

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[5] These two safeguards were set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965). *Freedman* identified a third safeguard: the censor must bear both the burden of going to court and the burden of proof once in court. *Id.* at 58-60. As we observe today in *11126 Baltimore Blvd.*, "[t]he splintered opinion of the *FW/PBS* Court leaves the continued application of the third *Freedman* factor subject to some speculation." Slip op. at 13 n.12. Because Highway Craft has not invoked the third *Freedman* safeguard, we need not address whether it applies.

its favor. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980).

But a closer look at the district court's order reveals that Highway Craft was indeed aggrieved by the judgment below. Although the district court held that the licensing scheme is constitutionally deficient because it lacks an essential procedural safeguard, the court suggested that the licensing provisions could be enforced nevertheless and ordered that Highway Craft "may file for injunctive relief in the event it deems such relief necessary or appropriate." *Chesapeake B & M*, 831 F. Supp. at 1253. Likewise, in its subsequent memorandum opinion denying Highway Craft's motion to amend the judgment, the court suggested that, although the constitutional deficiency here (the absence of a procedural safeguard) is not severable, the County could still apply the Licensing Law, and Highway Craft could file for injunctive relief if the County were not to issue a license within a reasonably brief time. *Cheaspeake B & M, Inc. v. Harford County, Md.*, Civ. No. B-92-2049, at 2-3 (D. Md. Jan. 26, 1994). Because the district court's order suggests that the County can enforce the licensing scheme despite its constitutional infirmity, the scope of the Licensing Department's discretion and promptness of judicial review remain of consequence, and Highway Craft was aggrieved by the judgment below.

That being said, we must express disagreement with how the district court disposed of this case. The court held that the licensing scheme, on its face, poses the risk that protected expression will be suppressed for an indefinite time before an administrative decision (and, it follows, before a judicial decision, *see infra note* 6). However, notwithstanding this risk of indefinite delay, the court ruled that the licensing scheme is enforceable because, the court suggested, the Licensing Department *might* decide within a reasonably brief time whether to issue or deny a license. Put another way, the court apparently thought it determinative that the licensing scheme *could*

be applied in a constitutional manner. But "[w]e cannot depend on the individuals responsible for enforcing the Ordinance to do so in a manner that cures it of constitutional infirmities." *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994) (holding that the ordinance on its face failed to impose reasonable time limits on the administrative process), *cert. denied*, 115 S. Ct. 1697 (1995). We find no support in the Supreme Court's cases for the proposition that a licensing scheme that lacks an essential procedural safeguard—and thus constitutes an impermissible prior restraint—may nevertheless be enforced and challenged only on an "as applied" basis. Indeed, the Court's cases clearly suggest otherwise. *See, e.g., Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317 (1980) (per curiam) (lack of procedural safeguards "precludes the enforcement" of statute). In short, the licensing scheme is unenforceable because it does not ensure a prompt administrative decision, and we must vacate the district court's order to the contrary.

D.

Because the licensing scheme is unenforceable, it appears (at first blush) that we do not need to reach the merits of either of Highway Craft's arguments for invalidating the licensing scheme as an impermissible prior restraint: (1) lack of prompt judicial review and (2) inadequate standards to guide the discretion of licensing officials. Indeed, we will not reach the second. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 802 & n.14 (1988) (because the licensing scheme was unconstitutional—it did not ensure an administrative decision within a specified, brief time—the Court said there was no need to decide whether the licensor had unbridled discretion to grant or deny a license). We will, however, address whether the County has provided for prompt judicial review, and we do so to be consistent with the Supreme Court's licensing cases. *See FW/PBS, supra; Blount v. Rizzi*, 400 U.S. 410 (1971); *Teitel Film Corp. v. Cusack*,

390 U.S. 139 (1968) (per curiam); *Freedman v. Maryland*, 380 U.S. 51 (1965). In each of these cases the Court reviewed the adequacy of each procedural safeguard.

The district court held that the Licensing Law adequately provides for prompt judicial review because it allows an applicant or licensee to appeal to the Circuit Court for Harford County in the event the Licensing Department denies, suspends or revokes a license. The court said that "[t]he County has no further obligation to set time limits on judicial review." *Chesapeake B & M*, 831 F.Supp. at 1250.[6] Highway Craft contends that "prompt judicial review" requires more than prompt access to the judiciary. Highway Craft argues that the County must ensure a sufficiently prompt judicial decision on the merits. For the reasons announced today in our en banc opinion in *11126 Baltimore Blvd., supra*, we agree that prompt judicial review means a sufficiently prompt decision on the merits. Therefore, we reverse the district court's judgment on this issue.[7]

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[6] The district court's conclusion that the Licensing Law provides for prompt judicial review is curious in light of its finding that the administrative process could be delayed indefinitely. In the event of such delay, the judicial review provision would not be triggered. *See Redner*, 29 F.3d at 1502 (the ordinance was "inadequate under any interpretation of 'prompt judicial review' " because, without definite time limits on the administrative process, "expressive activity could be suppressed indefinitely prior to any judicial review").

[7] It is perhaps appropriate at this point to respond to the dissenting opinion.

The dissent reluctantly concedes that the Licensing Law imposes a prior restraint on protected speech. *See post* at 25, 26-27. Nevertheless, the dissent contends that procedural safeguards are not required for all prior restraints. We cannot agree. The Supreme Court has made clear that any system of prior restraint must place adequate time limits on the decision-making process. *FW/PBS*, 493 U.S. at 226. The dissent fails to recognize that the procedural safeguards are designed to ensure this requirement of

E.

Although the County's licensing scheme is an unconstitutional prior restraint on protected speech, there are some regulatory provisions in the Licensing Law that appear unrelated to the licensing process and might be capable of functioning independently from the licensing scheme (*e.g.*, the operating requirements in § 58-7, the additional requirements in § 58-8 and the obscene public performance ban in § 58-12). Because the Licensing Law contains a severability clause, we remand to the district

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expeditious decision making. *See id.* at 227 ("In *Freedman*, we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the [licensor]. . . ."). In short, "[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business *must be issued within a reasonable period of time*, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards [time limits on licensor and prompt judicial review] *are essential* . . . ." *Id.* at 228 (emphases added).

Contrary to the Supreme Court, the dissent posits a theory that the procedural safeguards do not come into play unless an ordinance is found to contain one of "two evils": (1) "unbridled discretion in the duration of the licensor's decision" or (2) "unbridled substantive discretion in the licensor's application of its decisionmaking criteria." *Post* at 25. But the presence of one of these two "evils" would be enough by itself to invalidate an ordinance. Therefore, the dissent's approach would effectively render the safeguards meaningless: they would be required only for those ordinances that are already invalid.

Finally, we note that the dissent does not faithfully apply its approach to the facts of this case. The dissent says safeguards would be required if the Licensing Law conferred "unbridled discretion on . . . the duration of the decision-making process," *Id.* at 26, but concludes it does not. That conclusion, however, flies in the face of the district court's holding, *unchallenged by the County*, that the "the ordinance lacks specific time limits" and "allows the Licensing Department to delay the process." *Chesapeake B & M, Inc.*, 831 F. Supp. at 1253. The dissent appears to get around this by invoking the amendments to the Licensing Law. *See post* at 25 n.3. But the amendments were not before the district court and are not before us in this appeal.

court to determine whether and to what extent the licensing scheme is severable from the remainder of the Licensing Law. *See FW/PBS*, 493 U.S. at 230 (remanding for severability determination); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (standards for severability determination).

III.

Highway Craft next urges as a separate matter that the Licensing Law is not narrowly tailored to serve the County's interest in minimizing the undesirable secondary effects associated with sexually oriented businesses. Highway Craft complains that the district court never addressed this issue because the court erroneously suggested that the narrow tailoring analysis is limited to a determination whether the requirements of *FW/PBS* (fettered discretion and procedural safeguards) are satisfied. To the extent the court so suggested, it erred. The "intermediate scrutiny" analysis applicable to content-neutral restrictions on speech is distinct from the prior restraint analysis we discussed in Part II, *supra*. *See 11126 Baltimore Blvd.* (en banc), *supra; Wall Distribs.*, 782 F.2d at 1170. The latter is concerned with the risks of censorship and delay when the enjoyment of protected expression is contingent upon obtaining permission from government officials; the former is concerned with the ends government can pursue, the means with which it can pursue those ends, and the relationship between them. A licensing scheme may adequately fetter the licensor's discretion and provide adequate procedural safeguards yet contain specific licensing or regulatory provisions that do not further a substantial governmental interest (*e.g.*, an outrageously high licensing fee or an unreasonable restriction on the hours of operation).

Highway Craft's conclusory argument on narrow tailoring appears to challenge only the disclosure provisions, which require applicants and licensees to disclose to the Licensing Department certain background and personal

information, and the civil disability provisions, *see supra* note 1. We will limit our discussion to these provisions because Highway Craft has not pointed us or the district court to any others it believes are not narrowly tailored.[8]

As for the disclosure provisions, we need not decide whether they are narrowly tailored, for they are intimately tied in with the licensing scheme we have today invalidated for lacking the essential procedural safeguards. *See FW/PBS*, 493 U.S. at 236 n.3 (in light of its conclusion that the licensing requirement was unconstitutional because it lacked essential procedural safeguards, the Court said it would not reach petitioners' other First Amendment challenges to the licensing scheme); *id.* at 243 (Brennan, J., concurring in the judgment) ("since the Court invalidates the application of the entire Dallas licensing scheme to any First Amendment-protected business under the *Freedman* doctrine, it is unnecessary to decide whether some or all of the same provisions are also invalid . . . on other grounds").

As for the civil disability provisions, Highway Craft has failed to show that it has standing to challenge them. Highway Craft focuses on the provision that says an applicant convicted for one of the thirty-two enumerated Maryland crimes cannot operate an adult bookstore for two years. "To establish standing to challenge that provision [Highway Craft] must show both (1) a conviction

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[8] Highway Craft's brief also makes a general assertion (without citation to authority) that the County relied on no evidence during the enactment proceedings to show that the Licensing Law would serve an important state interest. In this connection, it complains that the random inspection requirement has no "independent basis" in the legislative record, which was not before the court below. These claims have no merit. *See Renton*, 475 U.S. at 50-52; *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991) (plurality opinion); *id.* at 582 (Souter, J., concurring in the judgment); *Wall Distribs.*, 782 F.2d at 1169 & n.7; *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 828-29 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).

of one or more of the enumerated crimes, and (2) that the conviction . . . occurred recently enough to disable the applicant under the ordinance." *Id.* at 234. Highway Craft's complaint alleged that, as of May 11, 1992, the date the Licensing Law was enacted, all four adult bookstores then existing in the County, including Highway Craft, had been convicted for one of the enumerated crimes (a Maryland obscenity law). But the record does not confirm when (or even whether) Highway Craft was in fact convicted for one of the enumerated crimes. As the Supreme Court emphasized in *FW/PBS*, "It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.' " *Id.* at 231 (citations omitted). And " 'the necessary factual predicate may not be gleaned from the briefs and arguments themselves.' " *Id.* at 235 (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 547 (1986)).[9]

Because Highway Craft has not established that it has standing to challenge the disability provisions, the district court below lacked jurisdiction to adjudicate Highway Craft's claims with respect to those provisions, namely the bill of attainder and ex post facto claims. Accordingly, we must vacate that portion of the district court's

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[9] We note that even if the record had supported Highway Craft's allegation that it has standing to challenge the disability provisions, it would be unnecessary for us to reach the merits. The disability provisions, like the disclosure provisions mentioned above, are an integral part of the unconstitutional licensing scheme. Of the six Justices in *FW/PBS* who voted to invalidate the licensing scheme there, three opined that it was unnecessary to reach the constitutionality of the disability provisions once it was determined that the licensing scheme lacked the essential procedural safeguards. 493 U.S. at 242-44 (Brennan, J., concurring in the judgment) (emphasizing that reaching the disability provisions was "unnecessary to the decision" and "superfluous" since "the Court invalidate[d] the application of the entire Dallas licensing scheme to any First Amendment-protected business under the *Freedman* doctrine").

judgment dealing with the disability provisions. *See id.* at 235-36 (vacating judgment below for lack of standing).

IV.

We hold that the County has not provided for prompt judicial review, and we reverse the district court's judgment to the contrary. Moreover, we hold that, because the licensing scheme lacks essential procedural safeguards, it is an unconstitutional prior restraint on protected speech. As such, it is unenforceable, and we vacate the district court's order insofar as it holds otherwise. Furthermore, we hold that Highway Craft lacks standing to challenge the disability provisions, and we vacate that portion of the district court's judgment relating to those provisions (the bill of attainder and ex post facto claims). Finally, we remand to the district court to decide whether and to what extent the invalid licensing scheme is severable.

REVERSED IN PART, VACATED IN PART, AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

NIEMEYER, Circuit Judge, dissenting:

In this case and the related case of *11126 Baltimore Boulevard, Inc. v. Prince George's County, Md.*, No. 93-2151, both decided today, the majority opinions have stricken down as unconstitutional ordinances enacted by two Maryland counties to regulate the secondary effects of adult bookstores whose business is to sell sexually explicit materials and to provide sexually oriented entertainment. These ordinances do not *directly* prohibit the sale of sexually explicit material; rather they prohibit any "adult bookstore," as defined in each ordinance, from conducting business without first obtaining a license (a "permit" in Harford County and a "special exception" in Prince George's County).

The ordinance before us in this case does not confer unbridled discretion upon the licensor to deny a permit to a qualifying adult bookstore and therefore does not warrant the procedural safeguards prescribed in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990).[1] Furthermore, this

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[1] While the majority chooses to characterize the Harford County ordinance as imposing a direct prior restraint on speech. I do not share that view. The legislation's prohibition is directed only against conducting an adult bookstore *business* without a permit, and only through the permitting process does it indirectly impose a prior restraint on speech. It is precisely because the legislation's effect only incidentally burdens speech through the permit requirement that we need not apply the procedural safeguards prescribed by *Freedman v. Maryland*, 380 U.S. 51 (1965) (addressing *direct* prior restraints on speech). Ordinances of the type involved here are measured by whether they grant the licensor so much discretion that an exercise of discretion could mask an improper direct restraint on speech.

The majority also misunderstands my analysis of the Supreme Court's holdings on prior restraints. What I demonstrate is that if there is no unbridled discretion in the duration of the administrator's decisionmaking process *and* there is no unbridled substantive discretion in the decisionmaker's application of its decisionmaking criteria, then even if there were no prompt judicial review, the ordinance would not be constitutionally infirm. Similarly, when

ordinance is a content-neutral "time, place and manner" regulation adopted to address the secondary effects of adult bookstores, warranting affirmance under the jurisprudence of *Renton v. Playtime Theaters, Inc.*, 475 U.S.

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an ordinance embodies discretion—either substantive or temporal—in administrative decisionmaking, it is not thereby automatically rendered infirm. For example, in *Freedman*, the Court made clear that prompt judicial review of the substantive discretion inherent in the censorship of obscene material would suffice to render the ordinance therein constitutional. In other words, the Supreme Court has required prompt judicial review of administrative decisions only where those decisions embodied discretion in the scope *or* duration of the decisionmaking process, but not where the administrative decisionmaking was nondiscretionary in scope and duration. *See, e.g., Freedman* (unbridled discretion in substantive scope and time frame of decisionmaking); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (unbridled discretion in scope of decisionmaking); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (same); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (unbridled discretion in time frame of decisionmaking); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) (same). Thus, the Supreme Court has never held that prompt judicial review is required in a case such as the instant one in which the administrative decisonmaker's discretion was cabined both substantively and temporally. *Cf. Cox v. New Hampshire*, 312 U.S. 569 (1941) (statute embodying no substantive discretion upheld against First Amendment attack).

Finally, the majority has misunderstood my application of *FW/PBS* by pointing out that the ordinance in this case affords too much discretion by failing to constrain adequately the time limits in the permitting process. *See* slip op. 7 n.7. The district court held that the permit decisionmaking time frame was not adequately limited, but that ruling was not appealed by Harford County. Rather, following the district court's conclusion in that regard, the county imposed a 45-day limit on the permitting process, which the district court had concluded would be reasonable. *See Chesapeake B & M, Inc.*, 831 F. Supp. at 1249. Accordingly, I have therefore not expressed any disagreement with the particular ruling of the district court that the original time for permit processing was unconstrained. Rather, I have assumed that to be a fact since it is not before us. My opinion goes only to the timeliness of access to judicial review.

41 (1986), and *Young v. American Minitheaters, Inc.*, 427 U.S. 50 (1976).

Even if prompt access to judicial review of a permit denial is a required safeguard under *FW/PBS*, as the majority maintains, I would interpret that safeguard as requiring only that exit from the executive branch (the administrative licensing system) be prompt and that access to the judicial system be imemdiately available. Since the nature of the safeguard is *access* to a court, and not the rendering of any given decision of the court, I cannot subscribe to the position that the procedural safeguard requires prompt *completion* of the judicial review any more than it requires a particular result. At least three other circuits share this view. *See Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068 (5th Cir. 1994); *TK's Video v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc); *Jews for Jesus v. Massachusetts Bay Trans. Author.*, 984 F.2d 1319 (1st Cir. 1993). *Cf. O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990) (declining to apply *FW/PBS* safeguards where it found adult entertainment licensing scheme imposed no restraint and where plaintiff theater was closed because of significant number of acts of public indecency).

In any event, in this case the Maryland Rules provide for a prompt judicial decision.

I

The County Council of Harford County, Maryland, enacted Bill No. 92-27, known as the Harford County Adult Bookstore Licensing Law, on May 11, 1992, to address the secondary effects of sexually oriented businesses on the community. In general terms, the ordinance (1) requires persons whose principal business is to sell or rent material depicting or describing sexual activity to obtain a license, and establishes qualifications for becoming a licensee; (2) requires licensees to remain in compliance with specifi-

cally identified criminal laws, generally relating to sexual misconduct; (3) imposes location requirements for adult bookstores; (4) directs adult bookstores that include viewing booths or theaters to meet prescribed design and lighting requirements; and (5) subjects persons who violate the statute to a fine not exceeding $1,000 or imprisonment not exceeding six months, or both.

More particularly, the Adult Bookstore Licensing Law requires all "adult bookstores" as defined by the ordinance [2] to apply for licenses within 45 days of the effective date of the ordinance. The undisputed purpose for enacting the ordinance, as found by the district court, was "to prevent prostitution, neighborhood blight, declining property values, and the transmission of sexual diseases." The county relied on "convincing documented evidence" that sexually-oriented businesses adversely affect neighboring property by increasing crime, lowering property values, promoting prostitution and casual sexual liaisons, and increasing the transmission of sexual diseases. The district court held that "[t]he ordinance is thus designed to combat these secondary effects," remaining consistent with its stated intent not "to suppress any speech protected under the First Amendment to the United States Constitution, but to enact a content-neutral law that addresses the adverse secondary effects of sexually-oriented businesses."

To qualify as a licensee under the ordinance, a person must (1) be 18 years old, (2) possess a Maryland trader's

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[2] An "adult bookstore" is defined in § 58-1(B) of the ordinance to include every business which, as its principal purpose, sells or rents:

(1) Books, magazines, periodicals, other printed matter, photographs, films, motion pictures, video cassettes, video reproductions, slides, or other visual representations that describe or depict a sexual act or depict human genitalia in a state of sexual arousal; or

(2) Instruments, devices, or paraphernalia designed for use in connection with sexual acts.

license, (3) not have been convicted of any one of a list of specified state crimes principally related to sexual misconduct, (4) possess a retail tax identification number, and (5) provide a business site that conforms to the ordinance. To satisfy the ordinance, a business site must not be loçated within 1000 feet of another adult bookstore or other specific types of property; it must conform to state health laws; and, if the business is to have viewing booths or an adult threater, it must conform in layout and lighting to requiremen's of the ordinance.

The application process requires that an applicant submit a completed application, signed under oath, together with a $200 fee. The county's Department of Licensing then submits the application to the health department to inspect for violations of the state health laws and may submit it to other departments to provide the county with "information concerning the application." As originally enacted, the ordinance required the Harford County Department of Licensing to notify the applicant whether he qualifies for a license within seven calendar days *after receiving the information from the agencies* involved in the review process. Following the district court's ruling that this scheme impermissibly left an indefinite time for the approval process, the ordinance was amended to require that the Department of Licensing issue or deny a license within 45 days of receiving the application, but those amendments are not before us. A license may be denied if the applicant fails to qualify, fails to pay the application fee, or engages in fraud in the application process. From a decision denying a license, the applicant is given the right to appeal directly to the Circuit Court for Harford County within 30 days for review of the Department's decision.

The ordinance also regulates the operation of adult bookstores by, among other things, restricting the age and activities of persons who frequent the store, imposing restrictions on those who staff the business, and pro-

hibiting sexual activity on the premises. Finally, the ordinance provides criminal penalties for its violation.

Chesapeake B & M, Inc. is a business in Harford County which the county maintains is an "adult bookstore" within the meaning of the ordinance. Following adoption of the ordinance, Chesapeake B & M filed suit against Harford County for a declaratory judgment that the ordinance is unconstitutional in violation of the First and Fourteenth Amendments and an injunction barring its enforcement. It contended, with a broad, facial challenge to the ordinance, that, among other things, the ordinance imposes a prior restraint on protected speech without adequate safeguards.

On cross motions for summary judgment, the district court declared that the ordinance was unconstitutional in failing to ensure completion of the *licensing* process within a specified time and in failing to maintain the status quo during the application period.

While various steps provided for in the ordinance allowed a total of 44 days, the court observed that the ordinance failed to "anticipate that an agency may not furnish the requested informaiton within the [required] 30-day period." The court concluded that because of this omission, the ordinance allows Harford County to "delay the process by awaiting the recalcitrant agency's input." If the process were limited to the specified 44 days, however, the court concluded that the time period would be reasonable and in conformance with the First Amendment. Following the district court's decision, Harford County amended the ordinance to mandate that a license be issued or denied within 45 days in any case.

The court rejected all other constitutional challenges. It concluded that the ordinance was not primarily aimed at protected speech but at the secondary effects of adult bookstores, and did not grant unbridled discretion to county officials. The court rejected the challenge that

the statute did not provide for prompt judicial review of a license denial, concluding that the ordinance, under applicable Supreme Court law, need only provide for the *availability* of prompt judicial review, which was provided by the ordinance. I agree and would therefore affirm.

II

In *FW/PBS v. Dallas*, 493 U.S. 215 (1990), the Supreme Court held that a Dallas, Texas, ordinance regulating sexually oriented businesses, including adult bookstores, by means of zoning, licensing, inspections, and civil disability provisions, conferred unbridled discretion on the licensor, and thus offended the First Amendment. Justice O'Connor, in an opinion joined by Justices Stevens and Kennedy, explained that "prior restraints" embodying either of the two types of evils of unbridled discretion "will not be tolerated" and will be struck as unconstitutional under the First Amendment.

First, the Court will strike down prior restraints which confer unbridled substantive discretion on the licensor. *See, e.g., FW/PBS*, 493 U.S. at 225-26. For example, where the licensor's decisionmaking criterion is whether " 'in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that [a parade permit] be refused,' " the Court held that a parade permit ordinance, as written, conferred "virtually unbridled and absolute power" upon the licensor, and offended the First Amendment. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150 (1969). Similarly, in *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), the Supreme Court found that the city mayor's discretion with respect to whether to grant or deny a permit for the placement of newsracks—such that the mayor could deny a permit simply by stating that the permit was not in the public interest—conferred unbridled discretion on the mayor to determine who may or may not speak. The Court noted:

> It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement "it is not in the public interest" when denying a permit application. . . . To allow these illusory "constraints" to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little more than a high-sounding ideal.

486 U.S. at 769-70.

Second, the Court will not tolerate prior restraints which confer unbridled discretion as to the *duration or length* of the licensor's decisionmaking process. As Justice O'Connor explained, "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of [substantive] unbridled discretion." *FW/PBS*, 493 U.S. at 227. *See also Freedom v. Maryland*, 380 U.S. 51, 57 (1965) (noting that the failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating excessive administrative discretion"); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (striking down statute on ground that it restrained speech for an "indefinite duration"). Justice O'Connor's opinion in *FW/PBS* found that the city's adult-oriented business regulatory scheme "allow[ed] indefinite postponement of the issuance of a license," 493 U.S. at 227, and thus embodied a "species of unbridled discretion" antithetical to the protection of First Amendment freedoms, *id.* at 223.

Where, however, a licensing or permit scheme which regulates speech does not confer either temporal or substantive discretion on the licensor, it does not necessarily offend the First Amendment. As Professor John Calvin Jeffries, Jr., explains in his article "Rethinking Prior Restraint," 92 Yale L.J. 409 (1983):

[First Amendment-based concerns regarding licensing or "administrative preclearance" requirements] are linked to a single factor, a factor ordinarily determinative of the constitutional fate of preclearance requirements. That factor is discretion. Where broad discretion is left in the hands of executive officials—as in a statute authorizing denial of a permit for very general reasons—the vices described above [e.g., unduly broad scope of censorship, removal of the censoring decision from effective public scrutiny, institutional incentives to censor] loom very large indeed. Where, on the other hand, executive discretion is tightly controlled—as in a statute requiring issuance of a permit on specified showings—the problems of preclearance seem relatively less troublesome.

The dangers of discretion have been emphasized repeatedly by the Supreme Court. Virtually all of the permit decisions [finding such schemes unconstitutional] identify unconstrained executive discretion over speech and related activities as the chief reason for invalidation. . . . [For example, in *Shuttlesworth*], in which the Court struck down a law authorizing denial of a parade permit whenever city officials thought that "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused" . . . . [t]he Court found this law defective in its failure to provide "narrow, objective, and definite standards to guide the licensing authority." And when such standards are provided (assuming, of course, that they are substantively consistent with the First Amendment), parade permit laws and other kinds of nondiscretionary licensing requirements are routinely upheld [citing *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (upholding rule restricting First Amendment protected activities

> to certain location at fair) and *Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding content-neutral time, place, and manner restrictions on religious parade)].

Id. at 423. Professor Jeffries continues by explaining that judicial supervision of a licensor's decisions is called for in cases where the licensor's decisionmaking criteria themselves are inherently incapable of definition in "narrow, precise, and objective terms" (such as is found in the contours of the Supreme Court's definition of "obscenity"). Thus, where a censor reviews films for their obscene content and makes the decision to censor based on the imprecise constitutional criteria for obscene speech, *see Miller v. California*, 413 U.S. 15 (1973), it is impossible to eradicate the licensor's discretion from that decision, and judicial supervision of the licensor's inherently discretionary decision is necessary. *See Freedman v. Maryland*, 380 U.S. 51 (1965). However, when the criteria for administrative decisionmaking are themselves substantively consistent with the First Amendment and do not inherently or as formulated allow for unbridled discretion on the part of the decisionmaker, the "prior restraint" on speech effected by a licensing scheme does not embody any of the dangers which would necessitate heightened procedural safeguards.

For example, if a county were to enact a permit system requiring anyone wishing to partake in a parade to fill out an application stating his name, address, the estimated number of marchers, and whether any of the marchers had been arrested for disorderly conduct in public within the past month, and if the parade permit would be automatically granted within 30 days of application if there were no such arrests and automatically denied within 30 days if there were any such arrests, such a regulatory scheme would not embody either the evil of unbridled discretion in the duration or in the scope of the licensor's decisionmaking. Assuming that the disorderly conduct

criterion were a constitutionally valid one, this permit system would not embody an unconstitutional prior restraint and the predicate calling for expeditious judicial review of the licensor's decision would not be present. *Cf. Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (upholding against First Amendment attack convictions for violating state statute prohibiting parade upon public street without a license, where New Hampshire Supreme Court had narrowly construed the statute to limit the discretion of the licensing authority to considerations of time, place, and manner exclusively); *Shuttlesworth v. Birmingham*, 394 U.S. at 154-55 (where state supreme court construed parade ordinance to authorize "no more than the objective and even-handed regulation of traffic on Birmingham's streets and public ways," the Supreme Court will assume that ordinance as authoritatively construed would pass constitutional muster).

While the Harford County licensing ordinance at issue arguably embodies a prior restraint on protected speech (at least with respect to an adult bookstore's dissemination of non-obscene materials), this ordinance does not embody an unconstitutional prior restraint on speech requiring procedural safeguards because it does not possess either of the two evils of unbridled discretion identified by the Supreme Court.

First, the ordinance does not embody unbridled discretion in the duration of the licensor's decision because the ordinance explicitly requires that an agency grant or deny a license within 44 days.[3] *See, e.g., TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 708 (5th Cir. 1994) (upholding 60-day period for administrative review of licensing application for adult bookstore).

[3] As we noted above, the district court found a loophole in the mandatory licensing period, prompting it to find that aspect of the ordinance unconstitutional. That loophole has been plugged by a mandatory 45-day limit on the licensing period, which the district court found constitutionally reasonable.

Second, the Harford County ordinance does not confer unbridled substantive discretion in the licensor's application of its decisionmaking criteria. Information which the licensor may consider in making a decision is constrained by § 58-2(A) of the ordinance, which establishes qualifications for a licensee, and by § 58-2(C), which prescribes the information to be included in an application. Section 58-2(A) provides that to qualify as a licensee, an applicant must (1) be 18 years old, (2) have a valid Maryland trading license, (3) not be convicted of specified crimes, (4) have a place of business that conforms in location, layout, and lighting to the specific requirements of the ordinance, and (5) have a retail sales tax identification number. Similarly, § 58-2(C) requires an applicant to provide routine informaiton such as his or her name, address, telephone number, and birthdate. It also requires information about the physical layout of the proposed premises, the identification of employees, and a statement about the licensee's criminal record.

The particularized nature of the application information and the operating requirements constrain the inquiry of the licensing agency. Nowhere in the ordinance can I find an unconstrained grant of discretion to any agency official that could provide a subterfuge for pretextual license denials. Indeed, the ordinance, in specifying a list of reasons for denying an application, inherently precludes unbridled discretionary decisionmaking on the part of the licensor.[4] Because the Harford County licensing scheme contains sufficiently determinate criteria for the issuance of licenses, it does not confer unbridled discretion on county officials to censor protected speech.

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[4] Section 58-6 of the ordinance authorizes the Department of Licensing to deny a license for the following reasons: (1) the required fee is not paid; (2) the premises do not conform to the requirements of the ordinance; (3) the applicant refuses an inspection of the premises to determine if it conforms; (4) the applicant commits fraud in the application process; or (5) the applicant has been convicted, pled nolo contendere, or received probation before judgment for any of a specified list of state crimes.

Therefore, although such a scheme may embody a "prior restraint" of sorts, it is not a prior restraint that requires special procedural safeguards because it does not confer unbridled discretion on the licensor with respect to the scope or the duration of the decision-making process. Because the Harford County ordinance does not confer unbridled discretion upon the licensor, in contrast to the licensing scheme at issue in *FW/PBS*, this ordinance need not satisfy the procedural safeguards set forth in Justice O'Connor's opinion. *See Graff*, 9 F.3d at 1329-33 (Flaum, J., concurring) (reasoning that because the factors upon which the permit denials at issue were based provide "definite and finite guidelines" and do not vest the licensor with unbridled discretion, "the Ordinance does not grant to city officials the sort of standardless carte blanche that the Supreme Court has unfailingly condemned . . . [and] consequently . . . does not implicate the kinds of risks which should necessitate a special provision of judicial review.").

III

Even if the Harford County ordinance does require special procedural safeguards, the majority overreaches in the type of safeguards it would impose. Beginning with the conclusion that "expeditious judicial review of [the executive's] decision must be available," *see FW/PBS*, 493 U.S. at 227, the majority opinion errs in interpreting the nature of that safeguard to mean that "expeditious judicial review" requires a "prompt [judicial] decision on the merits." Slip op. at 11. That additional requirement of securing a prompt judicial decision is not, I submit, imposed by *FW/PBS*, is unnecessary in the absence of direct prior restraint of speech, and misconstrues the essence of the safeguard.

First, it must be recognized that *FW/PBS* provides no Court opinion addressing the issue. Justice O'Connor's opinion, on which the majority relies, was joined only by Justices Stevens and Kennedy. While Justices Brennan,

Marshall, and Blackmun joined in a separate opinion urging greater protection than that articulated in Justice O'Connor's opinion, they did not join in her opinion.[5] 493 U.S. at 238. Consequently, the majority can logically claim no greater safeguard than that imposed in Justice O'Connor's opinion.

As Justice O'Connor concluded in *FW/PBS*, a licensing ordinance designed to address the secondary effects of adult oriented businesses need not provide the full procedural safeguards required of a direct censorship law. 493 U.S. at 228. Such a licensing law impinges only incidentally upon protected speech, because it is aimed at the secondary effects of such speech rather than its content. As Justice O'Connor noted in *FW/PBS*, the licensor need not bear the burden of going to court or the burden of proof once in court. *See* 493 U.S. at 227-230. Moreover, an ordinance of the type under consideration there must only provide the "possibility of prompt judicial review," 493 U.S. at 228, or "an avenue for prompt judicial review," *id.* at 229. Thus, I conclude from Justice O'Connor's express language that an adult bookstore licensing law that does not impose direct censorship of materials need only provide for prompt *access* to judicial review and need not guarantee a prompt *completion* of the judicial review process.

Since the decision in *FW/PBS*, at least three courts of appeals which have considered the appropriate standard to be applied with respect to judicial review of license denials implicating free speech have reached the same conclusion. *See Graff v. Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc) (holding that *availability* of state's common law procedure for seeking a writ of certiorari in court to review an administrative agency decision regarding the licensing of sidewalk newsstands is sufficient to meet the *FW/PBS*'s "prompt judicial review"

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[5] These justices urged application of the safeguards articulated in *Freedman v. Maryland*, 380 U.S. 51 (1965), a position not shared by a majority of the Court. 493 U.S. at 239.

requirements); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) (holding that *FW/PBS*'s requirement of "prompt judicial review" is satisfied by "access [to] the courts within a brief period," i.e., by giving the aggrieved party 30 days to appeal to court); *Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068, 1070 (5th Cir. 1994) ("We have interpreted [*FW/PBS*'s "prompt judicial review"] language to require only access to the courts within a specified brief period."). *See also Jews for Jesus v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1327 (1st Cir. 1993) (applying *FW/PBS*'s standard to regulations of expressive activity in subway station, and holding that "prompt judicial review" is provided where applicant denied license may appeal denial in court and is granted hearing); *cf. O'Connor v. City and County of Denver*, 894 F.2d 1210 (10th Cir. 1990) (declining to apply any of the *Freedman* procedural safeguards (as recast in *FW/PBS*) to the First Amendment analysis of adult entertainment licensing scheme on the ground that such scheme did not involve prior restraints and was based instead on licensee's failure to prevent patrons' engagement in public sex acts in theater).

Moreover, I believe that the nature of the safeguard—assurance of *the availability* of prompt judicial review—cannot meaningfully be interpreted to include the rendering of a court's decision. The essence of the safeguard is the *review* and not the result. When an executive official is given discretionary authority that can have the effect of censoring protected speech, the executive's decision must be reviewable by the judicial branch, and the promptness of instigating that judicial review is the requisite safeguard. Since there are no external checks on the judiciary's review, the scope of the safeguard of necessity ends with access to the judicial branch. If the judiciary agrees that protected speech has been improperly censored, it can act within hours. On the other hand, if it concludes that the would-be censor acted properly and did not unconstitu-

tionally suppress speech, then its decision ends the matter. While the judiciary may not get it right, its *review,* and not the result it reaches, defines the limit of the safeguard.

Thus, I would conclude that prompt judicial review as a safeguard means prompt *exit* from the executive branch and immediate *entry* into the judicial branch, and I believe that the better reading of *FW/PBS* supports this conclusion.

IV

Even though I am satisfied that the Harford County ordinance meets the requirement of *FW/PBS* of providing prompt *access* to the courts (assuming *arguendo* that the safeguards articulated in *FW/PBS* even apply to the county's nondiscretionary licensing scheme), I note nevertheless that the Maryland Rules provide ample mechanisms for completing any judicial review expeditiously should the need arise. Chesapeake B & M is entitled to appeal to the Harford County Circuit Court on the very day of the agency's decision, and it need not wait until the end of the 30-day period. The record must be filed by the county within 60 days, but the Maryland Rules expressly provide that "the court may shorten or extend the time for transmittal of the record." Md. Rule 7-206 (d). And while a hearing is not routinely scheduled under the Maryland Rules before 90 days after the record is filed, Md. Rule 7-208(b), the court may shorten this time as well. *Id.*

In addition to the specific procedural rules applicable to appeals from agency decisions, the Maryland Rules provide generally that the times specified by the rules "requir[ing] or allow[ing] an act to be done" may be shortened on the motion of any party and for cause shown. Md. Rule 1-204. Moreover, the Maryland Rules provide that a person may apply for an *ex parte* injunction or an interlocutory injunction at any time. The procedures for obtaining an *ex parte* injunction assure a most expedited schedule. *See, e.g.,* Md. Rule BB72. These rules are

repeatedly used to achieve the most prompt review and appeal of a broad array of time-sensitive issues, such as election disputes, death penalty cases, and public health matters.

I agree with the district court that in this case that prompt judicial review is available through the ordinance and through Maryland's rules of civil procedure, assuming that such review is required.

V

A county's interest in preserving the quality of its community, by enacting an ordinance such as the Harford County Adult Bookstore Licensing Law, is one "that must be accorded high respect." *Young*, 427 U.S. at 71. Furthermore, "[i]t is manifest that society's interest in protecting [expression of "erotic materials that have some arguably artistic value"] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 70. My review of the ordinance in this case for the defects alleged by Chesapeake B & M leads me to conclude that the county's effort in this case does not run afoul of the First Amendment. It does not, I submit, even incidentally impinge upon free speech or the free exchange of ideas in Harford County. Accordingly, I would affirm the judgment of the district court and therefore respectfully dissent.

I am authorized to report that Judge Russell, Judge Widener, and Judge Chapman join in this dissenting opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. B-92-2049

CHESAPEAKE B & M, INC., ETC.

v.

HARFORD COUNTY, MARYLAND

ORDER

In accordance with the Memorandum Opinion filed today in the above-captioned case, IT IS, this 25th day of August, 1993, by the United States District Court for the District of Maryland,

ORDERED:

(1) That the Motion for Summary Judgment of Chesapeake B & M, Inc. (Paper 6) and Harford County's Cross-Motion for Summary Judgment (Paper 9) BE, and the same hereby ARE, GRANTED IN PART and DENIED IN PART as follows:

(a) With regard to the issue of specific time limitations, Harford County Bill No. 92-27 is unconstitutional; and

(b) In all other respects, Harford County Bill No. 92-27 is constitutional;

(2) That Chesapeake B & M, Inc., may file for injunctive relief in the event it deems such relief necessary or appropriate; and

(3) That the Clerk shall mail a copy of this Order and the accompanying Memorandum Opinion forthwith to counsel of record.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. ——

CHESAPEAKE B & M, INC.,
Appellant

v.

HARFORD COUNTY, MARYLAND,
Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 1st day of March, 1994, a copy of Appellant's Docketing Statement was mailed, postage prepaid, to Stephen W. Lutche and Diane T. Swint, Assistant County Attorneys, Harford County Government, Department of Law, 220 South Main Street, Bel Air, Maryland 21014, attorneys for Appellee.

/s/ Howard J. Schulman
HOWARD J. SCHULMAN
Suite 700
100 Light Street
Baltimore, Maryland 21202
(410) 576-0400
Attorney for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. B-92-2049

CHESAPEAKE B & M, INC., T/A
HIGHWAY CRAFT, GIFT & BOOK STORE

v.

HARFORD COUNTY, MARYLAND

Filed: August 25, 1993

BLACK, DISTRICT JUDGE.

Presently pending before the Court are the Motion for Summary Judgment of Chesapeake B & M, Inc. and Harford County's Cross-Motion for Summary Judgment. Chesapeake B & M, Inc., filed the underlying complaint to challenge the constitutionality of the Harford County Adult Bookstore Licensing Law, or Harford County Bill No. 92-27. This bill requires an operator of adult bookstores to be licensed and establishes a system for such licensing.

According to Chesapeake, the County has violated the First Amendment of the United States Constitution by passing this bill. In support thereof, Chesapeake raises the following arguments: (1) the County created the licensing system with the primary purpose of suppressing the free speech of adult bookstore operators; (2) the County failed to set forth, during the enactment proceedings, substantial evidence to show that the bill serves im-

portant state interests; (3) the County failed to narrowly draw the bill to limit the amount of infringement on protected speech; (4) the bill delegates decision-making authority to officials whose actions are unreviewable; (5) the bill allows law enforcement agencies to conduct inspections of the bookstores at virtually any time; (6) the bill lacks effective time limitations on the administrative review process; and (7) the bill fails to provide for prompt judicial review of administrative decisions.

Chesapeake contends that the licensing law violates other constitutional provisions as well. For example, Chesapeake asserts that the random inspections by law enforcement agencies are proscribed by the Fourth Amendment. In addition, Chesapeake challenges the law as violative of Article I, § 9, clause 3, which prohibits bills of attainder or ex post facto laws.

Chesapeake has moved for summary judgment and Harford County has filed a cross-motion for summary judgment, alleging that no genuine issue of material fact exists with respect to any claim.

I. SUMMARY JUDGMENT STANDARDS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3186 (1990).

Here, the Court finds that there are no genuine issues of material fact. This conclusion is supported not only by the state of the record but also by the actions of the parties, both of whom have submitted summary judgment motions that concentrate almost exclusively on the legal interpretation of the Harford County ordinance. Accordingly, the Court shall review the law as applied to the undisputed facts of this case.

II. STANDING

At the outset, the Court notes that Chesapeake has experienced no actual harm because it has not yet applied for a license under the Harford County ordinance. In light of this fact, Chesapeake is actually raising a facial challenge to the County ordinance. Under the traditional doctrine of standing, a federal court is typically constrained from exercising jurisdiction over an action unless the plaintiff has suffered some actual or threatened injury arising from an act of the defendant. *Heckler v. Mathews*, 465 U.S. 728, 738, 104 S. Ct. 1387, 1394 (1984). However, the U.S. Supreme Court has carved out an exception for facial challenges to statutes alleged to be violative of the First Amendment. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223, 110 S. Ct. 596, 603 (1990); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-756, 108 S. Ct. 2138, 2143 (1988). In particular, a plaintiff may facially challenge a statute that allegedly vests a government official with "unbridled discretion" to decide whether to suppress protected speech. *FW/PBS*, 493 U.S. at 223, 110 S. Ct. at 603; *Members of the City Council for the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 n.15, 104 S. Ct. 2118, 2125 n.15 (1984). Because Chesapeake sets forth such an allegation here, the Court finds that standing exists.

III. PRIOR RESTRAINT

Chesapeake primarily asserts that the Hartford County licensing ordinance is an unconstitutional prior restraint on its exercise of protected speech. In resolving this case, the Court must first determine whether the ordinance is content-neutral or content-based. Although the Supreme Court has thus far refrained from categorizing licensing ordinances, *FW/PBS*, 493 U.S. at 223, 110 S. Ct. at 603, it is apparent to this Court that the instant ordinance is necessarily tied to the content of adult bookstores. In-

deed, licensing is required for all adult bookstores, defined by the ordinance in terms of their content. For example, § 58-1(B) defines an adult bookstore as "a commercial establishment that as its principal business purpose sells or rents . . . books . . . that describe or depict a sexual act or depict human genitalia in a state of sexual arousal." The Court therefore cannot turn a blind eye to the fact that content plays a role in this licensing plan.

The Court must next ascertain whether the speech in question is protected by the First Amendment. Although the subject matter referred to in § 58-1(B) has overtones of indecency, the speech in the adult bookstores falls short of obscenity, which is a species of unprotected speech. *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607 (1973). In fact, the parties themselves agree that the speech at issue deserves protection. For these reasons, the Court concludes that the ordinance involves protected speech.

As a general matter, restrictions on protected speech are presumed unconstitutional if their purpose is to restrict speech because of its content. *City of Renton v. Playtime Theatres,* 475 U.S. 41, 46-47, 106 S. Ct. 925, 928-29 (1986). However, if the restrictions are primarily aimed at the noncommunicative aspects of the protected speech, the government may impose reasonable time, place, and manner restrictions. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S. Ct. 2746, 2753-54 (1989); *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165, 1168 (4th Cir. 1986). For such restrictions to pass constitutional muster, they must satisfy four safeguards designed to minimize the suppression of speech. First, the restriction must be within the constitutional powers of the government. *Wall,* 782 F.2d at 1169. Second, the restriction must further an important or substantial government interest. *Id.* Third, the governmental interest must be unrelated to the suppression of free expression. *Id.* And fourth, the resulting incidental restric-

tion on free speech must be no greater than necessary to advance the government interest. *Id.* Essentially, the first three prongs of the *Wall* test refer to the power of the government to adopt a regulation related to speech, and the fourth prong refers to the proper method for implementing the regulation.

A. The County's Power to Adopt the Ordinance

At the outset, the Court finds that Harford County acted within its constitutional powers to enact the ordinance. Because the ordinance is designed to prevent prostitution, neighborhood blight, declining property values, and the transmission of sexual diseases, the County is authorized to act pursuant to its general police powers. *See Wall,* 782 F.2d at 1169. Therefore, the first prong of the *Wall* test has been satisfied.

In construing the second prong, which requires the ordinance to advance important governmental interests, the courts limit the extent of their judicial review. In *Wall,* the Fourth Circuit held that "[j]udicial review goes only to whether the legislative determination of justification and fitness is not facially without factual support, hence not arbitrary and capricious." *Id.* In conducting this review, the courts may rely on the governmental interests set forth in the ordinance itself. *Postscript Enterprises v. City of Bridgeton,* 905 F.2d 223, 227 (8th Cir. 1990) (where one clause alone served as an adequate factual undergirding for the ordinance); *Mitchell v. Commissioners of Com. on Adult Entertainment Establishments,* 802 F. Supp. 1112, 1120 (D.Del. 1992). In other words, the government need not conduct an independent investigation into the harms of unregulated adult bookstores. *Renton,* 475 U.S. at 51-52, 106 S. Ct. at 931. Instead, the government can rely merely on a "sufficiently documented wider national experience properly reflected in matters of public record." *Wall,* 782 F.2d at 1169-1170 n.7. Indeed, some courts have virtually taken judicial

notice of the tendency of adult bookstores to cause undesirable secondary effects. *Id.; Postscript Enterprises,* 905 F.2d at 227.

In the instant case, the Harford County ordinance sets forth ten introductory clauses relating to the governmental interests served by the regulation. For example, the ordinance states that "[t]here is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on nearby businesses and surrounding residential areas, causing increased crime and lowering property values." In addition, the ordinance expressly finds that sexually-oriented businesses often promote prostitution and casual sexual liaisons, thereby increasing the transmission of sexual diseases. The ordinance is thus designed to combat these secondary effects. Because other courts have held that the interests served by such an ordinance are substantial and "must be accorded high respect," *Renton,* 475 U.S. at 47-50, 106 S. Ct. at 929-930; *Mitchell,* 802 F. Supp. at 1119-1122, this Court finds that Harford County has satisfied the second prong of the *Wall* test.

The third prong requires that the asserted governmental interests bear no relation to the suppression of speech. To be constitutional, therefore, an ordinance must be predominantly concerned with eradicating the undesirable secondary effects of the speech activity. *See Renton,* 475 U.S. at 48, 106 S. Ct. at 929-30; *Mitchell,* 802 F. Supp. at 1117. In assessing the predominate concern, the "courts must look only to the face of the regulation and the identifiable interest advanced to justify the regulation." *Wall,* 782 F.2d at 1170. The motivation of the legislators is irrelevant. *Mitchell,* 802 F. Supp. at 1120. Indeed, as the Supreme Court noted in *United States v. O'Brien,* 391 U.S. 367, 383, 88 S. Ct. 1673, 1682 (1968), an otherwise constitutional statute will not be struck down "on the basis of an alleged illicit legislative motive."

Accordingly, the Court finds that the County's interests, as set forth on the face of the ordinance, bear no direct relation to the suppression of free speech. Each introductory clause evidences a concern for eradicating the non-speech byproducts of adult bookstores. For this reason, the Court finds that the ordinance satisfies the third prong of the *Wall* test.

B. The Proper Method of Implementation

Having concluded that the County has the power to enact a licensing ordinance, the Court must next determine whether the ordinance satisfies the fourth prong of the *Wall* test. This prong requires the government to tailor the ordinance narrowly to avoid suppression of the protected speech. With special relevance to licensing regulations, the Supreme Court has identified three mandatory characteristics of a narrowly-tailored plan. First, the ordinance must not place unbridled discretion in the hands of a government official or agency. *FW/PBS*, 493 *U.S.* at 225, 110 S. Ct. at 605; *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1573 (D.Minn. 1992). Second, any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained. *FW/PBS*, 493 U.S. at 227, 110 S. Ct. at 606; *Wolff*, 803 F. Supp. at 1573. Third, in the event a license is denied, expeditious judicial review of the denial must be available. *FW/PBS*, 493 U.S. at 227, 110 S. Ct. at 606; *Wolff*, 803 F. Supp. at 1573.

1. Unbridled Discretion

Chesapeake asserts that the Harford County ordinance vests unbridled discretion in County officials to suppress speech. Specifically, it refers to § 58-3 of the ordinance, which instructs the Licensing Department to

> 1) request that the Health Department inspect the bookstore to ensure that it is in compliance with all applicable county and state health laws; and

2) refer the application to any other agency from which the Department requests information concerning the application.

Within 30 days, the Health Department and the other agencies are directed to respond to the requests for information. Based upon this information, the Licensing Department makes a determination as to whether the applicant qualifies for a license. Chesapeake contends that the phrase "all applicable county and state health laws" is an ambiguous grant of authority and "brings with it a myriad of potential instruments of censorship."

When the government passes a licensing ordinance, it must ensure that the limits on discretion are "made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood,* 486 U.S. at 770, 108 S. Ct. at 2151. In other words, the extent of discretion must be "susceptible of objective measurement." *SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1277 & n.28 (5th Cir. 1988) (where the ordinance listed eight explicit guidelines for exercising discretion). This requirement is necessary to minimize the possibility that a decision-maker will suppress protected speech.

Viewed against this legal backdrop, the Court finds that the Harford ordinance contains the requisite limitations on discretion. While this Court agrees with Chesapeake that the phrase "all applicable county and state health laws" might lead to abuse, the Supreme Court implicitly approved such a limitation in *FW/PBS.* In that case, the court reviewed the general constitutionality of a licensing ordinance. The court found many constitutional failings in the ordinance, but it was silent on the question of whether there was unbridled discretion even though an application had to be "approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances." 493 U.S. at 227, 110 S. Ct. at 605. By its reticence, therefore,

the court condoned this limitation. Because the Harford provision relating to health codes is analogous, the *FW/PBS* decision directs this Court to find the provision constitutional.

As a general matter, therefore, the Court recognizes that the Licensing Department's discretion in reviewing applications is limited to the text of the ordinance as well as those laws that are generally applicable to similarly-situated businesses. While by no means exhaustive, a list of such laws would usually include health, safety, and zoning regulations. With these limitations in mind, there is no reason for Chesapeake to fear unbridled discretion.[1]

2. Specific Time for Administrative Review

Chesapeake also asserts that the ordinance violates the First Amendment because the administrative review process lacks effective limitations of time. Section 58-3 of the ordinance provides the following language:

> A. Within 7 calendar days after receiving an application for a license to operate an adult bookstore, the [Licensing] Department shall: 1) request that the Health Department inspect the bookstore to ensure that it is in compliance with all applicable county and state health laws; and 2) refer the application to any other agency from which the [Licensing] Department requests information concerning the application.
>
> B. Within 30 calendar days after receiving the [Licensing] Department's request: 1) the Health De-

[1] Chesapeake makes the ambiguous assertion that the ordinance also violates the First Amendment because it permits random inspections by law enforcement agencies at any time the bookstore is open for business. Apparently, Chesapeake is concerned that the police officers will conduct the inspections without clear guidelines, thus acting with unbridled discretion. The Court rejects this assertion in light of its ruling that the County may only act in accordance with the text of the ordinance and those laws which are generally applicable to like businesses.

> partment shall inspect the bookstore and notify the [Licensing] Department of whether the bookstore is in compliance with the applicable health laws; and 2) any other agency to which the application was referred shall furnish the information the [Licensing] Department requested.
>
> C. Within 7 calendar days after receiving all of the information required under subsection B of this section, the [Licensing] Department shall notify the applicant of whether it qualifies for a license.
>
> D. If an applicant qualifies for a license under this Article, the [Licensing] Department shall issue a license to the applicant.

As a general matter, Chesapeake argues that the 44-day time limit is unreasonable, thereby constituting an unconstitutional prior restraint. In addition, Chesapeake contends that the ordinance "does not provide any means by which the bookstore can ensure that the information requested is supplied to the [Licensing] Department within the thirty day period." As a result, Chesapeake asserts that the licensing scheme has the potential for indefinite postponement.

A licensing ordinance is constitutional only if the licensor is required to "make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained . . . ." *FW/PBS*, 493 U.S. at 228, 110 S. Ct. at 606; *Wolff*, 803 F. Supp. at 1574. Essentially, a licensing ordinance must satisfy a three-prong test: (1) it must establish specific time limits; (2) the time limits must be reasonable; and (3) the status quo must be maintained during the administrative process.

As applied to the instant case, the Court finds that § 58-3 is unconstitutional for failing to satisfy two of these prongs. First, the provision lacks specific time limits. While the ordinance facially establishes a 44-day period,

it fails to anticipate that an agency may not furnish the requested information within the 30-day period. In other words, the ordinance lacks a provision that would automatically waive the Licensing Department's right to await receipt of the requested information if the agency does not respond within 30 days. Due to this defect, the ordinance allows the Licensing Department to delay the process by awaiting the recalcitrant agency's input. This delay would present an applicant with two difficult choices—to await the compliance of the agency or to file a mandamus action in court to force the agency to comply. In either case, the burden on the applicant would be contrary to the Supreme Court's requirement of specific time limits.[2]

Second, the ordinance fails to expressly provide that the status quo will be maintained for existing bookstores during the application process. While Harford County has assured the Court that the status quo is maintained in practice, there is no guarantee that the County will keep its word. For this reason, the ordinance is constitutionally defective.

The time schedule established by the ordinance passes constitutional muster in one respect: if the agencies comply with their deadlines, then the 44-day time period itself is reasonable. While the Court recognizes that such a determination is typically inappropriate for summary judgment, Chesapeake has failed to carry its burden to create a disputed issue of fact. Indeed, Chesapeake has never asserted that the County is deliberately prolonging the review process. The Court therefore is free to conclude that 44 days is reasonable in light of the administrative burdens facing the County. Moreover, this finding is consistent with the *Wolff* case, which held that a 90-day

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[2] Although this holding may appear severely limiting to the County, the ordinance does provide that the County is permitted at all times to inspect the premises and to suspend the license if the operator violates the ordinance or any applicable criminal laws.

review period was reasonable and thereby constitutional. 803 F. Supp. at 1574.

Chesapeake asserts that the 44-day time period, regardless of its factual necessity, is unreasonable as a matter of law. In support, Chesapeake has cited a series of cases, all of which are distinguishable upon closer analysis. For example, in some cases, the ordinances were deemed unconstitutional for failing to maintain the status quo, not for imposing an unreasonably long time period for review. *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 141, 88 S. Ct. 754, 756 (1968); *Freedman v. Maryland,* 380 U.S. 51, 52, 85 S. Ct. 734, 735 (1965); *Famine Relief Fund v. West Virginia,* 905 F.2d 747, 753 (4th Cir. 1990). In another case, an ordinance was found unconstitutional for requiring parade organizers to give 20 days' notice prior to marching. *N.A.A.C.P. v. City of Richmond,* 743 F.2d 1346, 1354-57 (9th Cir. 1984). In that case, the court held that parade applications deserve expedited review because the timing of a parade is often critical to its message. *Id.* at 1356. Here, however, Chesapeake has not proffered any argument that its message needs to be communicated immediately. In any event, Chesapeake's bookstore is currently open for business. Finally, Chesapeake refers to *Elrod v. Burns* for the principle that even a minimal time period constitutes a First Amendment violation. 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976). This principle is no longer controlling in this case in light of the *FW/PBS* decision in 1990, which provides for a "specified and reasonable time period." 493 U.S. at 228, 110 S. Ct. at 606.

Accordingly, the Court finds that § 58-3 is unconstitutional for failing to establish specific time limits and for lacking a provision to maintain the status quo. On the other hand, the Court finds that § 58-3 is constitutional in respect to the reasonableness of the 44-day time schedule.

3. Availability of Prompt Judicial Review

Chesapeake contends that the Harford ordinance is unconstitutional because it fails to provide for prompt judicial review of administrative decisions denying an application. Section 58-10 of the ordinance provides the following pertinent language:

> If the [Licensing] Department denies an application for a license or suspends or revokes a license, the applicant or licensee may appeal the [Licensing] Department's decision to the Circuit Court for Harford County.

In particular, Chesapeake asserts that the ordinance is defective because it does not limit the time in which the circuit court must resolve the appeal. To be constitutionally valid, Chesapeake contends that the ordinance must contain such limits as are found in Md. Ann. Code art. 27, § 418A. Under § 418A, a State's Attorney has the power to seek to enjoin obscene speech by filing an action for an injunction in the circuit courts. The court is then required to hold a trial within one day after the opposing party joins issue. Within two days following the trial, the court must render its opinion.

As the Supreme Court has made evident, a licensing ordinance need only provide for the *availability* of prompt judicial reivew. In *FW/PBS*, the Supreme Court twice indicated that such ordinances need only assure an avenue for judicial review. 493 U.S. at 227-28, 110 S. Ct. at 606 ("there must be the *possibility* of prompt judicial review in the event that the license is erroneously denied" and "expeditious judicial review of that decision must be *available*") (emphasis added). While the court thus recognized the importance of judicial review, it never held that the judiciary must restructure itself to resolve licensing disputes within a set time period. Instead, the court simply struck down the underlying ordinance because it contained no provision allowing for an appeal to a court.

In the instant case, the Court finds no support for Chesapeake's claims of unconstitutionality. In light of *FW/PBS*, the Harford County ordinance is constitutional because it expressly provides for judicial review by the County's circuit court. The County has no further obligation to set time limits on judicial review.[8] If Chesapeake is truly concerned about expeditious review by the circuit court, the Court notes that Chesapeake has available a motion to shorten time pursuant to Maryland Rule § 1-204.

Accordingly, the Court finds that the provisions of § 58-10 of the Harford County ordinance are constitutional.

IV. ADDITIONAL CHALLENGES

Chesapeake contends that the licensing law violates other constitutional provisions as well. It asserts that the random inspections by law enforcement agencies are proscribed by the Fourth Amendment. In addition, Chesapeake challenges the law as violative of Article I, § 9, clause 3, which prohibits bills of attainder or ex post facto laws.

A. Random Inspections

Chesapeake alleges that § 58.7(A)(6) of the ordinance violates the Fourth Amendment's prohibition on unreasonable searches and seizures. The ordinance provides in pertinent part the following:

> The operator of an adult bookstore shall . . . permit inspection of the bookstore and its premises by an employee or designated representative of the [Licensing] Department, the Health Department, and any

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[8] If licensing ordinances were required to contain such time limits, Chesapeake has sought relief from the wrong defendant. Under Article IV, § 1, of the Constitution of Maryland, the circuit court is a repository of the judicial power of the *State*, not the County. Accordingly, because the County lacks the power to impose its will on the State's judicial system, Chesapeake should have named the State of Maryland as a party defendant.

> law enforcement agency with jurisdiction in the County at any time the bookstore is occupied or open for business.

While the ordinance refers to three groups with power to inspect, Chesapeake only opposes inspections conducted by law enforcement agencies.

At the outset, the Court recognizes that Chesapeake has no standing to make this challenge because no law enforcement agency has as yet inspected the bookstore pursuant to the instant ordinance. Nevertheless, even assuming that standing exists, Chesapeake has no actionable claim based on the Fourth Amendment. In *Paris Adult Theatre I v. Slaton*, the Supreme Court held that the right to privacy does not extend to a place of public accommodation. 413 U.S. 49, 66-67, 93 S. Ct. 2628, 2640 (1973). To illustrate this point, the court observed,

> Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

Id. In the instant case, Chesapeake's business is certainly a public accommodation. The Court therefore cannot extend to Chesapeake a blanket right to prohibit random inspections by police officers. Accordingly, the Court rejects Chesapeake's challenge to § 58-7(A)(6) of the County ordinance.

B. Bill of Attainder or Ex Post Facto Law

While unsure of the formal basis for its claim, Chesapeake contends that § 58-6 of the Harford County ordinance violates the constitutional prohibition against bills

of attainder or ex post facto laws. In particular, Chesapeake asserts that § 58-6 effectively disqualifies every existing bookstore in the County from obtaining a license on account of past criminal convictions. Section 58-6(A) of the ordinance provides the following pertinent language:

> The [Licensing] Department may deny a license to any applicant or suspend or revoke a license if: . . . (8) the applicant or licensee pleads guilty or nolo contendere with respect to, receives probation before judgment with respect to, or is convicted of a violation of any of the following sections of Article 27 of the Annotated Code of Maryland: . . . (1) § 416D (displaying certain visual representations for advertising purposes) . . . .

Chesapeake has proffered that each of the existing bookstores has been convicted of § 416D of the criminal code.

At the outset, the Court finds that this particular challenge is not ripe for resolution because Chesapeake has not yet applied for a license. Even if Chesapeake applies, it is not mandatory that the County deny the license based on § 58-6. This provision expressly vests the Licensing Department with discretion to deny a license on the basis of prior criminal offenses. Indeed, in a recent revision of the provision, the County apparently deleted the automatic disqualification language, substituting the words "may deny" for "shall deny." Until the County does deny Chesapeake's application on this ground, the Court is restrained from resolving the issue.

Even if the issue were ripe, Chesapeake has failed to convince the Court that § 58-6 is unconstitutional. First, Chesapeake has improperly based its challenge on section 9, clause 3, of Article I, which simply provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." Upon review of the law, the Court finds that neither theory is applicable. Second, even if Chesapeake selected a more appropriate theory, such as the Due Process Clause of the Fourteenth Amendment, it cannot prevail.

The ex post facto prohibition "forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 964 (1981) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-326, 18 L.Ed. 356 (1867)). As the Fourth Circuit has recently held,

> The prohibition against ex post facto laws applies only to penal legislation that imposes or increases *criminal* punishment for conduct predating its enactment. . . . The ex post facto clause is not applicable to legislation imposing civil disabilities.

Karpa v. C.I.R., 909 F.2d 784, 786-87 (4th Cir. 1990) (citation omitted). As applied to the instant case, the Court finds that § 58-6 is not an ex post facto law because it does not impose any criminal liability on Chesapeake. If anything, the ordinance simply imposes a civil liability based on Chesapeake's prior conviction.

A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803 (1977). As so defined, the instant ordinance does not constitute a bill of attainder because it does not legislatively determine the guilt of the bookstore operators. Indeed, the operators of the bookstores were found guilty of violating § 416D through a criminal process that is not alleged to be tainted. In addition, the ordinance is not a bill of attainder because it does not specifically identify a group for punishment. The Supreme Court has held that an ordinance specifically identifies a group if that group is "described in terms of conduct which, because it is past conduct, *operates only* as a designation of particular persons." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847, 104 S. Ct. 3348, 3352 (1984) (emphasis

added). The Harford County ordinance, however, could disqualify not only the existing bookstores but also any future applicant who has committed a violation of § 416D. For this reason, the Court finds that the ordinance does not constitute a bill of attainder.

Chesapeake's challenge to § 58-6 might more properly be based on the Due Process Clause of the Fourteenth Amendment. The Due Process Clause "generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive.'" *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13, 97 S. Ct. 1505, 1515 n.13 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147, 59 S. Ct. 121, 125 (1938)). A legislative act with retroactive application is not "harsh and oppressive" if it is justified by a rational legislative purpose. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718 (1984); *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

In this case, Harford County reserves the option of withholding licenses from applicants who have previously committed sexually-related criminal offenses. The County's purpose, apparently, is to prevent the recurrence of the criminal conduct. In the Court's view, such a purpose is eminently rational. If the Court were to adopt Chesapeake's contrary position, a legislative body would never be able to pass civil legislation in aid of its criminal process. For example, a legislative body could never pass a gun control bill that contained a provision disqualifying convicted murderers from purchasing handguns. Therefore, because the consequence of Chesapeake's position would be to hinder the effective passage of laws, the Court finds that § 58-6 does not violate the Due Process Clause.

For all of the foregoing reasons, the Court grants in part and denies in part Chesapeake's Motion for Summary Judgment and Harford County's Cross-Motion for Sum-

mary Judgment as follows: (a) with regard to the issue of specific time limitations, Harford County Bill No. 92-27 is unconstitutional; and (b) in all other respects, Harford County Bill No. 92-27 is constitutional. A formal Order will be entered in conformity with this Memorandum Opinion.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
Chief Judge

August 25, 1993

[Filed Jan. 27, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. B-92-2049

CHESAPEAKE B & M, INC., ETC.

v.

HARFORD COUNTY, MARYLAND

MEMORANDUM OPINION

On August 25, 1993, this Court filed a Memorandum Opinion finding that Harford County Bill No. 92-27 was unconstitutional with regard to the issue of specific time limitations and on the same date, the Court entered an Order in conformity with the Memorandum Opinion. On September 3, 1993, plaintiff Chesapeake B & M, Inc. filed a Motion to Amend the Judgment requesting the Court to reconsider its position on whether the ordinance in question was narrowly tailored, whether it vested unbridled discretion in County officials to suppress speech, and whether it provided for prompt judicial review of administrative decisions in denying allegations. In addition, plaintiff requested the Court to determine whether those portions of the ordinance declared unconstitutional were severable from those portions that the Court declared constitutional.

In the Court's 23-page Memorandum Opinion, it thoroughly set forth its position in regard to whether the ordinance was narrowly tailored, whether it vested unbridled discretion on County officials, and whether it pro-

vided prompt judicial review. No purpose would be served in reconsidering the Court's position on these issues.

In regard to the severability issue, the Court notes that Bill 92-27 provides that "if any provision of this Act or the application thereof to any person or circumstances is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any application of the Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable." The aspects of the ordinance which the Court found to be unconstitutional were (1) that it lacks specific time limitations, particularly in regard to a provision that would automatically waive the Licensing Department's right to await receipt of the requested information if an agency did not respond within 30 days, and (2) that it failed to expressly provide that the status quo would be maintained for existing bookstores during the application process. Under the circumstances, these defects involve the lack of a provision rather than the presence of an unconstitutional provision and, consequently, there is no provision to be severed from the rest of the ordinance. In any event, if the County should fail to afford plaintiff the benefit of these protections, the Court provided in its Order of August 25, 1993, that plaintiff "may file for injunctive relief in the event it deems such relief necessary or appropriate." Under the particular circumstances of this case, the issue of severability is of no real significance.

Accordingly, for all of the foregoing reasons, plaintiff's Motion to Amend the Judgment is denied. A formal order will be entered in conformity with this Memorandum Opinion.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
Chief Judge

January 26, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. B-92-2049

CHESAPEAKE B & M, INC., ETC.

v.

HARFORD COUNTY, MARYLAND

ORDER

In accordance with the Memorandum Opinion filed today in the above-captioned case, IT IS, this 26th day of January, 1994, by the United States District Court for the District of Maryland,

ORDERED:

(1) That the Motion to Amend the Judgment (Paper 14) filed on behalf of plaintiff Chesapeake B & M, Inc. BE, and the same hereby IS, DENIED; and

(2) That the Clerk shall mail a copy of this Order and the accompanying Memorandum Opinion forthwith to counsel of record.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
Chief Judge

APPENDIX C

FILED: November 2, 1994

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-2151

(CA-91-3697-K)

11126 BALTIMORE BOULEVARD,
INCORPORATED, t/a Warwick Books,
Plaintiff-Appellant,

versus

PRINCE GEORGE'S COUNTY, MARYLAND,
Defendant-Appellee.

No. 94-1270

(CA-92-2049)

CHESAPEAKE B & M, INCORPORATED, t/a
Highway Craft, Gift & Book Store,
Plaintiff-Appellant,

versus

HARFORD COUNTY, MARYLAND,
Defendant-Appellee.

ORDER

On the request for a poll in response to the suggestion for rehearing en banc filed in Case No. 93-2151, the court has voted to rehear that case en banc.

The panel in Case No. 94-1270 has decided to affirm without the publication of an opinion in view of the potential conflict with the decision in No. 93-2151. Judge Niemeyer and Judge Chapman voted to affirm and Judge Michael, to reverse.

Both cases will be heard together. While the decisions in both cases and the opinion in No. 93-2151 are vacated and all issues in both cases are open for reargument, the court has particular interest in the issue common to both cases of what is required to meet the requirement that "expeditious judicial review . . . must be available," *see FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 277 (1990), and whether the ordinances involved in these cases meet that requirement.

The Clerk of the Court is directed to establish an appropriate briefing schedule and this case is tentatively calendared for the March session of Court (March 6-10, 1995).

For the Court

/s/ Bert M. Montague
Clerk

APPENDIX D

COUNTY COUNCIL
OF
HARFORD COUNTY, MARYLAND

BILL NO. 92-27 As Amended [*]

Introduced by Council Member Barker

Legislative Day No. 92-7 Date March 3, 1992

AN ACT to repeal and reenact, with amendments, Chapter 58, Adult Entertainment, of the Harford County Code, as amended; to require that certain sexually oriented businesses be licensed; to establish certain qualifications for an applicant for a license; to require an applicant to provide certain information; to allow renewal of a license under certain circumstances; to establish certain duties, responsibilities, and operating requirements for a licensee; to assign certain duties, responsibilities, and powers to certain county departments and officials; to establish certain deadlines with respect to license applications and renewals; to allow denial, suspension, and revocation of licenses under certain circumstances; to allow appeals of a denial, suspension, or revocation; to establish certain requirements concerning the location of certain sexually oriented businesses; to authorize a suit for injunction in certain situations; to prohibit obscene public performances; to establish penalties for violations of this Act; to make the provisions of this Act severable; to require that certain existing sexually oriented businesses apply under this Act for

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[*] EXPLANATION:

CAPITALS INDICATE MATTER ADDED TO EXISTING LAW. [Brackets] indicate matter deleted from existing law. [*Italics*] [underlined in original] indicates language added to Bill by amendment. [Bold] language [lined through in original] indicates matter stricken out of Bill by amendment.

a license within a certain period; and generally relating to sexually oriented businesses.

By the Council, March 3, 1992

Introduced, read first time, ordered posted and public hearing scheduled

on: April 7, 1992

at: 6:00 PM

By Order: /s/ Doris Poulsen, Secretary

PUBLIC HEARING

Having been posted and notice of time and place of hearing and title of Bill having been published according to the Charter, a public hearing was held on April 7, 1992, and concluded on, April 7, 1992.

/s/ Doris Poulsen
Secretary

WHEREAS, There are in Harford County certain sexually oriented businesses that require special supervision from the public safety agencies of the county in order to protect the health, safety, and welfare of the customers of the businesses and the citizens of the county; and

WHEREAS, The County Council finds that these sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and,

WHEREAS, These activities can result in sexually transmitted diseases that threaten the health and, in the case of the AIDS virus, the lives of citizens; and

WHEREAS, A reasonable licensing scheme is a valid and legitimate means of insuring that operators of sexually oriented businesses do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

WHEREAS, There is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on nearby businesses and surrounding residential areas, causing increased crime and lowering property values; and

WHEREAS, There is also evidence that sexually oriented businesses located in close proximity to each other contribute to neighborhood blight and lessen the quality of life in the area; and

WHEREAS, The County Council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of county citizens; and

WHEREAS, The County Council also desires to protect county citizens from increased crime, to preserve the quality of life in the County, and to preserve the property values and character of neighborhoods; and

WHEREAS, It is not the intent of this Act to suppress any speech protected under the First Amendment to the United States Constitution, but to enact a content-neutral law that addresses the adverse secondary effects of sexually oriented businesses; and

WHEREAS, It is the intent of the County Council through this act to protect the health, safety, and welfare of the citizens of Harford County.

NOW, THEREFORE,

Section 1. Be It Enacted By The County Council of Harford County, Maryland, That Chapter 58, Adult Entertainment, of the Harford County Code, as amended, be, and it is hereby, repealed and reenacted with amendments, to read as follows:

Chapter 58. Adult Entertainment.

ARTICLE I. GENERAL PROVISIONS.

Section 58-1. Definitions.

A. For the purpose of this chapter, the following terms have the meanings [indicated:] INDICATED.

B. ADULT BOOKSTORE—A COMMERCIAL ESTABLISHMENT THAT AS ITS PRINCIPAL BUSINESS PURPOSE SELLS OR RENTS:

(1) BOOKS, MAGAZINES, PERIODICALS, OTHER PRINTED MATTER, PHOTOGRAPHS, FILMS, MOTION PICTURES, VIDEO CASSETTES, VIDEO REPRODUCTIONS, SLIDES, OR OTHER VISUAL REPRESENTATIONS THAT DESCRIBE OR DEPICT A SEXUAL ACT OR DEPICT HUMAN GENITALIA IN A STATE OF SEXUAL AROUSAL; OR

(2) INSTRUMENTS, DEVICES, OR PARAPHERNALIA DESIGNED FOR USE IN CONNECTION WITH SEXUAL ACTS.

C. ADULT THEATER—A ROOM OR AN AREA:

(1) LOCATED IN AN ADULT BOOKSTORE;

(2) CAPABLE OF ACCOMMODATING 6 OR MORE INDIVIDUALS; AND

(3) IN WHICH ARE SHOWN FILMS, MOTION PICTURES, VIDEO CASSETTES, OR OTHER MOVING PICTURES THAT DEPICT A SEXUAL ACT OR HUMAN GENITALIA IN A STATE OF SEXUAL AROUSAL.

D. APPLICANT—A PERSON WHO APPLIES UNDER THIS CHAPTER FOR A LICENSE TO OPERATE AN ADULT BOOKSTORE.

E. BOOKSTORE—AN ADULT BOOKSTORE.

F. CORPORATION—A CORPORATION ORGANIZED UNDER THE LAWS OF THE UNITED STATES, MARYLAND, ANOTHER STATE OF THE UNITED STATES, OR A TERRITORY, POSSESSION, OR DISTRICT OF THE UNITED STATES.

G. DEPARTMENT—THE DEPARTMENT OF INSPECTIONS, LICENSES AND PERMITS.

H. LICENSE—A LICENSE ISSUED UNDER THIS CHAPTER TO OPERATE AN ADULT BOOKSTORE.

I. LICENSEE—A PERSON LICENSED UNDER THIS CHAPTER TO OPERATE AN ADULT BOOKSTORE.

J. Obscene performance, exhibition, drama, play, show, dancing exhibition, tableau or entertainment—One which the average person, applying contemporary community standards, would find, taken as whole, appeals to the prurient interest and which, taken as a whole, lacks serious literary, artistic, [political] POLITICAL, or scientific value and where, in a patently offensive way, it conveys to the observer sexual conduct:

[A.] (1) As specifically defined in any statute of Maryland proscribing obscenity or obscene [performances.] PERFORMANCES; OR

[B.] (2) As specifically defined as follows, whether actual or simulated: [sexual or anal intercourse, masturbation, fellatio, cunnilingus or the fondling of the buttocks, anus, breasts or genitalia of oneself or another, or sexual stimulation by means of contact with animals or inanimate objects, or urination or defecation.]

(a) SEXUAL OR ANAL INTERCOURSE;

(b) MASTURBATION;

(c) FELLATIO;

(d) CUNNILINGUS;

(e) SADOMASOCHISTIC ABUSE;

(f) FONDLING OF THE BUTTOCKS, ANUS, BREASTS, OR GENITALIA OF ONESELF OR ANOTHER;

(g) SEXUAL STIMULATION BY MEANS OF CONTACT WITH ANIMALS OR INANIMATE OBJECTS;

(h) URINATION; OR

(i) DEFECATION.

K. SADAMASOCHISTIC ABUSE— FLAGELLATION OR TORTURE BY OR UPON AN INDIVIDUAL WHO IS NUDE OR CLAD IN UNDERGARMENTS OR OTHER REVEALING CLOTHING, OR THE CONDITION OF ONE WHO IS NUDE OR SO CLOTHED AND IS FETTERED, BOUND, OR OTHERWISE PHYSICALLY RESTRAINED.

L. SEXUAL ACT—MEANS:

(a) SEXUAL OR ANAL INTERCOURSE;

(b) MASTURBATION;

(c) FELLATIO;

(d) CUNNILINGUS;

(e) SADOMASOCHISTIC ABUSE;

(f) FONDLING OF THE BUTTOCKS, ANUS, BREASTS, OR GENITALIA OF ONESELF OR ANOTHER; OR

(g) SEXUAL STIMULATION BY MEANS OF CONTACT WITH ANOTHER, AN ANIMAL, OR AN INANIMATE OBJECT.

M. Simulated—The representation of an activity by mimicry, gesture or bodily movement in a manner that would clearly and unmistakably convey to an average adult that such activity is intended to be represented thereby.

N. SUBSTANTIALLY ENLARGE—TO INCREASE THE FLOOR AREA OF AN ADULT BOOKSTORE BY MORE THAN 25% OF THE FLOOR AREA OF THE BOOKSTORE AS IT EXISTED ON JANUARY 1, 1992.

O. VIEWING BOOTH—A PARTITIONED AREA CAPABLE OF ACCOMMODATING 5 OR FEWER INDIVIDUALS AND IN WHICH IS LOCATED A COIN-OPERATED OR SLUG-OPERATED OR ELECTRONICALLY, ELECTRICALLY. OR MECHANICALLY CONTROLLED STILL OR MOTION PICTURE MACHINE, PROJECTOR, OR OTHER IMAGE-PRODUCING DEVICE THAT DEPICTS A SEXUAL ACT OR HUMAN GENITALIA IN A STATE OF SEXUAL AROUSAL.

ARTICLE II. ADULT BOOKSTORES.

SECTION 58-2. LICENSE REQUIRED.

A. A PERSON SHALL NOT OPERATE AN ADULT BOOKSTORE WITHOUT A LICENSE FROM THE DEPARTMENT.

B. AN APPLICANT FOR A LICENSE SHALL:

(1) IF AN INDIVIDUAL, BE AT LEAST 18 YEARS OF AGE;

(2) POSSESS A VALID MARYLAND TRADER'S LICENSE;

(3) SUBMIT TO THE DEPARTMENT AN APPLICATION ON THE FORM THAT THE DEPARTMENT PROVIDES; AND

(4) SUBMIT WITH THE APPLICATION:

(a) THE APPROPRIATE COMPLETED MARYLAND STATE POLICE FORM AUTHORIZING A CRIMINAL BACKGROUND CHECK OF THE APPLICANT;

(b) THE APPROPRIATE FEES FOR THE CRIMINAL BACKGROUND CHECK;

(c) **A COPY OF A TAX MAP OR** A SITE PLAN SHOWING THAT THE LOCATION OF THE ADULT BOOKSTORE COMPLIES WITH § 58-9 OF THIS ARTICLE;

(d) THE STATE RETAIL SALES TAX IDENTIFICATION NUMBER ISSUED TO THE APPLICANT;

(e) A COPY OF THE MARYLAND TRADER'S LICENSE ISSUED TO THE APPLICANT; AND

(f) **AN** *A NONREFUNDABLE LICENSE AND* APPLICATION FEE OF **$500** *$200.*

C. THE APPLICATION SHALL BE MADE UNDER OATH AND SHALL INCLUDE THE FOLLOWING INFORMATION:

(1) THE NAME, DATE OF BIRTH, HOME ADDRESS, AND TELEPHONE NUMBER OF THE APPLICANT;

(2) THE ADDRESS AND TELEPHONE NUMBER OF THE ADULT BOOKSTORE;

(3) A DIAGRAM OF THE ADULT BOOKSTORE'S INTERIOR DRAWN AT THE SCALE REQUIRED BY THE DEPARTMENT, INCLUDING THE LOCATION OF ANY MANAGER'S STATION AND THE OVERHEAD LIGHTING REQUIRED BY § 58-8 OF THIS ARTICLE;

(4) A LIST OF **THE** *ALL* EMPLOYEES WHO WILL WORK IN THE BOOKSTORE AND THE ADDRESS AND DATE OF BIRTH OF EACH EMPLOYEE;

(5) IF THE APPLICANT IS A CORPORATION:

(a) A COPY OF THE CORPORATION'S ARTICLES OF INCORPORATION;

(b) A COPY OF THE CORPORATION'S BYLAWS; AND

(c) A LIST OF THE NAME AND ADDRESS OF EACH PERSON WHO OWNS 10% OR MORE OF THE CORPORATION;

(6) IF THE APPLICANT IS NOT A CORPORATION OR AN INDIVIDUAL, THE NAME AND HOME ADDRESS OF EACH PERSON WITH AN INTEREST OF 10% OR MORE IN THE APPLICANT; AND

(7) A STATEMENT OF WHETHER THE APPLICANT, THE APPLICANT'S SPOUSE, AN EMPLOYEE WHO WILL WORK IN THE BOOKSTORE, ANY INDIVIDUAL WITH WHOM THE APPLICANT RE-

SIDES, OR ANY PERSON WHO OWNS AN INTEREST **OR** *OF* 10% OR MORE IN THE APPLICANT HAS PLEADED GUILTY OR NOLO CONTENDERE WITH RESPECT TO, RECEIVED PROBATION BEFORE JUDGMENT WITH RESPECT TO, OR BEEN CONVICTED OF AN OFFENSE LISTED IN § 58-6A (8) OF THIS ARTICLE, AND IF SO THE LOCATION, DATE, AND NATURE OF THE PLEA, PROBATION, OR CONVICTION.

D. AN APPLICATION SHALL BE UNDER OATH AND SIGNED BY EACH APPLICANT.

E. IF AN APPLICANT IS NOT AN INDIVIDUAL, EACH INDIVIDUAL WHO OWNS AN INTEREST OF 10% OR MORE IN THE APPLICANT IS CONSIDERED AN APPLICANT AND SHALL:

(1) PROVIDE THE INFORMATION REQUIRED BY THIS SECTION; AND

(2) SIGN THE APPLICATION.

F. REGARDLESS OF THE NUMBER OF INDIVIDUALS REQUIRED TO SIGN A SINGLE LICENSE APPLICATION UNDER SUBSECTION E OF THIS SECTION, ONLY 1 STATE SALES TAX IDENTIFICATION NUMBER AND 1 MARYLAND TRADER'S LICENSE ARE REQUIRED FOR A LICENSE ISSUED UNDER THIS ARTICLE.

SECTION 58-3. INSPECTIONS; ISSUANCE OF LICENSE.

A. WITHIN 7 CALENDAR DAYS AFTER RECEIVING AN APPLICATION FOR A LICENSE TO OPERATE AN ADULT BOOKSTORE, THE DEPARTMENT **SHALL** *SHALL: (1)* REQUEST THAT THE HEALTH DEPARTMENT INSPECT THE BOOKSTORE TO ENSURE THAT IT IS IN COMPLIANCE WITH ALL APPLICABLE COUNTY AND STATE HEALTH **LAWS** *LAWS; AND*

(2) REFER THE APPLICATION TO ANY OTHER AGENCY FROM WHICH THE DEPARTMENT REQUESTS INFORMATION CONCERNING THE APPLICATION.

B. WITHIN 30 CALENDAR DAYS AFTER RECEIVING THE DEPARTMENT'S *REQUEST:* **REQUEST,** *(1)* THE HEALTH DEPARTMENT SHALL INSPECT THE BOOKSTORE AND NOTIFY THE DEPARTMENT OF WHETHER THE BOOKSTORE IS IN COMPLIANCE WITH THE APPLICABLE HEALTH **LAWS.** *LAWS; AND*

(2) ANY OTHER AGENCY TO WHICH THE APPLICATION WAS REFERRED SHALL FURNISH THE INFORMATION THE DEPARTMENT REQUESTED.

C. WITHIN **45** *7* CALENDAR DAYS AFTER RECEIVING **AN APPLICATION FOR A LICENSE TO OPERATE AN ADULT BOOKSTORE** *ALL OF THE INFORMATION REQUIRED UNDER SUBSECTION B OF THIS SECTION,* THE DEPARTMENT SHALL NOTIFY THE APPLICANT OF WHETHER IT QUALIFIES FOR A LICENSE.

D. IF AN APPLICANT QUALIFIES FOR A LICENSE UNDER THIS ARTICLE, THE DEPARTMENT SHALL ISSUE A LICENSE TO THE APPLICANT.

SECTION 58-4. TERM AND RENEWAL.

A. A LICENSE EXPIRES ON THE FIRST ANNIVERSARY OF ITS EFFECTIVE DATE, UNLESS THE LICENSE IS RENEWED FOR A 1-YEAR TERM AS PROVIDED IN THIS SECTION.

B. AT LEAST 60 CALENDAR DAYS BEFORE A LICENSE EXPIRES, THE DEPARTMENT SHALL MAIL TO THE LICENSEE A RENEWAL NOTICE THAT STATES:

(1) THE DATE ON WHICH THE CURRENT LICENSE EXPIRES;

(2) THE DATE BY WHICH THE DEPARTMENT MUST RECEIVE THE RENEWAL APPLICATION FOR THE RENEWAL TO BE ISSUED AND MAILED BEFORE THE CURRENT LICENSE EXPIRES; AND

(3) THE AMOUNT OF THE RENEWAL FEE.

C. *B.* BEFORE A LICENSE EXPIRES, THE LICENSEE PERIODICALLY MAY RENEW IT FOR AN ADDITIONAL 1-YEAR TERM, IF THE LICENSEE:

(1) OTHERWISE IS ENTITLED TO THE LICENSE;

(2) PAYS TO THE DEPARTMENT A RENEWAL FEE OF **$500** *$200*; AND

(3) SUBMITS TO THE DEPARTMENT:

(a) A RENEWAL APPLICATION ON THE FORM THAT THE DEPARTMENT PROVIDES; **AND**

(b) SATISFACTORY EVIDENCE OF THE LICENSEE'S CONTINUING COMPLIANCE WITH THIS ARTICLE.

(b) THE APPROPRIATE COMPLETED MARYLAND STATE POLICE FORM AUTHORIZING A CRIMINAL BACKGROUND CHECK OF THE LICENSEE; AND

(c) THE APPROPRIATE FEE FOR THE CRIMINAL BACKGROUND CHECK.

D. *C.* WITHIN 45 CALENDAR DAYS AFTER RECEIVING A RENEWAL APPLICATION FROM A LICENSEE, THE DEPARTMENT SHALL NOTIFY THE LICENSEE OF WHETHER IT QUALIFIES FOR RENEWAL OF THE LICENSE.

E. *D.* THE DEPARTMENT SHALL RENEW THE LICENSE OF EACH LICENSEE WHO MEETS THE REQUIREMENTS OF THIS SECTION.

SECTION 58-5. TRANSFER OF LICENSE.

A. A LICENSEE SHALL NOT TRANSFER THE LICENSE TO ANOTHER PERSON.

B. A LICENSEE IS VALID ONLY FOR THE LOCATION FOR WHICH IT IS ISSUED.

SECTION 58-6. DENIALS, SUSPENSIONS, AND REVOCATIONS OF LICENSES.

A. THE DEPARTMENT **SHALL** *MAY* DENY A LICENSE TO ANY APPLICANT OR SUSPEND OR REVOKE A LICENSE IF:

(1) THE APPLICANT OR LICENSEE DOES NOT PAY A FEE REQUIRED BY THIS ARTICLE;

(2) THE PREMISES OF THE ADULT BOOKSTORE FAIL AN INSPECTION REQUIRED BY § 58-3 OF THIS ARTICLE;

(3) THE APPLICANT, LICENSEE, OR AN EMPLOYEE OF THE APPLICANT OR LICENSEE REFUSES TO ALLOW AN INSPECTION OF THE ADULT BOOKSTORE BY AN EMPLOYEE OR DESIGNATED REPRESENTATIVE OF THE DEPARTMENT, THE HEALTH DEPARTMENT, OR A LAW ENFORCEMENT AGENCY WITH JURISDICTION IN THE COUNTY;

(4) THE APPLICANT OR LICENSEE FRAUDULENTLY OR DECEPTIVELY OBTAINS OR ATTEMPTS TO OBTAIN A LICENSE FOR THE APPLICANT OR LICENSEE OR FOR ANOTHER;

(5) THE APPLICANT OR LICENSEE FRAUDULENTLY OR DECEPTIVELY USES A LICENSE;

(6) THE APPLICANT OR LICENSEE PLEADS GUILTY OR NOLO CONTENDERE WITH RESPECT TO, RECEIVES PROBATION BEFORE JUDGMENT WITH RESPECT TO, OR IS CONVICTED OF A VIOLATION **OF THIS ARTICLE, OTHER THAN OPERATING AN ADULT BOOKSTORE WITHOUT A LICENSE, IN THE 2 YEARS PRECEDING THE DENIAL, SUSPENSION, OR REVOCATION;** *OF:*

(a) THIS ARTICLE, OTHER THAN OPERATING AN ADULT BOOKSTORE WITHOUT A LICENSE; OR

(b) ANY STATE LAW LISTED IN SUBSECTION A(8) OF THIS SECTION.

(7) *IN THE 2 YEARS BEFORE THE DENIAL, SUSPENSION, OR REVOCATION,* THE APPLICANT, THE LICENSEE, THE APPLICANT'S OR LICENSEE'S SPOUSE, OR AN INDIVIDUAL WITH WHOM THE APPLICANT OR LICENSEE RESIDES **PLEADS** *PLEADED* GUILTY OR NOLO CONTENDERE WITH RESPECT TO, **RECEIVES** *RECEIVED* PROBATION BEFORE JUDGMENT WITH RESPECT TO, OR **IS** *WAS* CONVICTED OF A VIOLATION OF:

(a) THIS ARTICLE, OTHER THAN OPERATING AN ADULT BOOKSTORE WITHOUT A **LICENSE, IN THE PAST 2 YEARS;** *LICENSE;* OR

(b) ANY STATE LAW LISTED IN SUBSECTION A(8) OF THIS SECTION; OR

(8) THE APPLICANT OR LICENSEE PLEADS GUILTY OR NOLO CONTENDERE WITH RESPECT TO, RECEIVES PROBATION BEFORE JUDGMENT WITH RESPECT TO, OR IS CONVICTED OF A VIOLATION OF ANY OF THE FOLLOWING SECTIONS OF ARTICLE 27 OF THE ANNOTATED CODE OF MARYLAND:

(a) § 1 (ABDUCTION OF INDIVIDUAL UNDER 16);

(b) § 2 (ABDUCTION OF CHILD UNDER 12);

(c) § 15 (BAWDY HOUSES AND HOUSES OF ILL FAME; PROSTITUTION, ETC.);

(d) § 23 (OFFERING BRIBE TO PUBLIC OFFICER, ETC.);

(e) § 26 (EMBRACERY, ETC.);

(f) § 27 (INTIMIDATING OR CORRUPTING JURORS, ETC.; OBSTRUCTING JUSTICE);

(g) § 35A (CHILD ABUSE)

(h) § 335 (INCEST);

(i) § 335A (INDECENT EXPOSURE);

(j) § 416B (SELLING OR OFFERING TO SELL CERTAIN VISUAL REPRESENTATIONS, PRINTED MATTER OR SOUND RECORDINGS TO MINORS);

(k) § 416C (EXHIBITION OF CERTAIN MOTION PICTURES OR PRESENTATIONS TO MINORS);

(l) § 416D (DISPLAYING CERTAIN VISUAL REPRESENTATIONS FOR ADVERTISING PURPOSES);

(m) § 416E (PERMITTING MINOR TO ENTER OR REMAIN ON CERTAIN PREMISES;

(n) § 418 (SENDING OR BRINGING OBSCENE MATERIAL INTO STATE FOR SALE OR DISTRIBUTION; PUBLISHING, ETC., WITHIN STATE);

(o) § 419 (SALE OR DISPLAY OF CERTAIN ITEMS TO PERSONS UNDER 18);

(p) § 419A (CHILD PORNOGRAPHY);

(q) § 426 (PANDERING GENERALLY);

(r) § 427 (PLACING, ETC. PERSON FOR IMMORAL PURPOSES);

(s) § 428 (RECEIVING MONEY, ETC., FOR PROCURING PERSON FOR HOUSE OF PROSTITUTION, ETC.);

(t) § 429 (PLACING, ETC., OF SPOUSE IN HOUSE OF PROSTITUTION, ETC.);

(u) § 430 (RECEIVING EARNINGS OF PROSTITUTE);

(v) § 431 (DETAINING PERSON IN HOUSE OF PROSTITUTION FOR DEBT);

(w) § 432 (TRANSPORTING PERSON FOR PROSTITUTION);

(x) § 462 (FIRST DEGREE RAPE);

(y) § 463 (SECOND DEGREE RAPE);

(z) § 464 (FIRST DEGREE SEXUAL OFFENSE);

(aa) § 464A (SECOND DEGREE SEXUAL OFFENSE);

(bb) § 464B (THIRD DEGREE SEXUAL OFFENSE);

(cc) § 464C (FOURTH DEGREE SEXUAL OFFENSE);

(dd) § 467A (TRANSFER OF RECORDED SOUND WITHOUT CONSENT OF OWNER OF MASTER DEVICE);

(ee) § 553 (SODOMY); OR

(ff) § 554 (UNNATURAL OR PERVERTED PRACTICES).

B. IN ADDITION TO THE AUTHORITY GRANTED BY SUBSECTION A OF THIS SECTION, THE DEPARTMENT **SHALL** *MAY* SUSPEND OR REVOKE A LICENSE IF:

(1) A LICENSEE OR AN EMPLOYEE OF THE BOOKSTORE HAS KNOWINGLY ALLOWED ON THE PREMISES THE POSSESSION, USE, OR SALE OF A CONTROLLED DANGEROUS SUBSTANCE LISTED IN ARTICLE 27, § 279 OF THE ANNOTATED CODE OF MARYLAND;

(2) A LICENSEE OR AN EMPLOYEE OF THE BOOKSTORE HAS KNOWINGLY ALLOWED PROSTITUTION ON THE PREMISES;

(3) A LICENSEE OR AN EMPLOYEE OF THE BOOKSTORE HAS KNOWINGLY ALLOWED A SEXUAL ACT ON THE PREMISES;

(4) A LICENSEE OR AN EMPLOYEE OF THE LICENSEE HAS KNOWINGLY OPERATED THE ADULT BOOKSTORE WHEN THE LICENSE WAS SUSPENDED; OR

(5) IN THE PRECEDING YEAR 2 OR MORE EMPLOYEES OF THE BOOKSTORE HAVE PLEADED GUILTY OR NOLO CONTENDERE WITH RESPECT TO, RECEIVED PROBATION BEFORE JUDGMENT WITH RESPECT TO, OR BEEN CONVICTED OF A VIOLATION OF ANY STATE LAW LISTED IN SUBSECTION A(8) OF THIS SECTION.

SECTION 58-7. OPERATING REQUIREMENTS.

A. THE OPERATOR OF AN ADULT BOOKSTORE SHALL:

(1) REQUIRE PROOF OF AN INDIVIDUAL'S AGE BEFORE ALLOWING THE INDIVIDUAL TO ENTER THE BOOKSTORE;

(2) ARRANGE THE BOOKSTORE'S INTERIOR SO THAT EMPLOYEES CAN OBSERVE ALL AREAS OF THE BOOKSTORE THAT ARE OPEN TO CUSTOMERS OR THE PUBLIC;

(3) ARRANGE THE BOOKSTORE'S MERCHANDISE SO THAT:

(a) NO MERCHANDISE DEPICTING A SEXUAL ACT OR HUMAN GENITALIA IN A STATE OF SEXUAL AROUSAL IS VISIBLE FROM OUTSIDE OF THE BOOKSTORE; AND

(b) NO MERCHANDISE DESIGNED FOR USE IN CONNECTION WITH A SEXUAL ACT IS VISIBLE FROM OUTSIDE OF THE BOOKSTORE;

(4) ENSURE THAT THE BOOKSTORE'S PARKING LOT IS **LIGHTED** *EQUIPPED WITH LIGHTING OF SUFFICIENT INTENSITY TO LIGHT THE LOT AT AN ILLUMINATION OF AT LEAST 2 FOOTCANDLES* AND IS POSTED WITH SIGNS THAT PROHIBIT LOITERING;

(5) REGULARLY CHECK THE PARKING LOT TO **ENSURE THAT** *TRY TO KEEP* CUSTOMERS AND MEMBERS OF THE PUBLIC **DO NOT LOITER OR COMMIT** *FROM LOITERING OR COMMITTING* SEXUAL ACTS THERE; **AND**

(6) PERMIT INSPECTION OF THE BOOKSTORE AND ITS PREMISES BY AN EMPLOYEE OR DESIGNATED REPRESENTATIVE OF THE DEPARTMENT, THE HEALTH DEPARTMENT, AND ANY LAW ENFORCEMENT AGENCY WITH JURISDICTION IN THE COUNTY AT ANY TIME THE BOOKSTORE IS OCCUPIED OR OPEN FOR **BUSINESS.** *BUSINESS; AND*

(7) WITHIN 30 CALENDAR DAYS AFTER EACH NEW EMPLOYEE BEGINS WORKING IN THE

BOOKSTORE, SEND WRITTEN NOTIFICATION OF THE EMPLOYEE'S NAME, ADDRESS, AND DATE OF BIRTH TO THE DEPARTMENT.

B. THE OPERATOR OF AN ADULT BOOKSTORE SHALL NOT:

(1) ALLOW AN INDIVIDUAL UNDER THE AGE OF 18 TO ENTER THE BOOKSTORE;

(2) *KNOWINGLY* ALLOW AN INDIVIDUAL TO COMMIT A SEXUAL ACT IN THE BOOKSTORE OR THE BOOKSTORE'S PARKING LOT; OR

(3) EMPLOY AN INDIVIDUAL WHO HAS IN THE PRECEDING 2 YEARS PLEADED GUILTY OR NOLO CONTENDERE WITH RESPECT TO, RECEIVED PROBATION BEFORE JUDGMENT WITH RESPECT TO, OR BEEN CONVICTED OF A VIOLATION OF:

(a) THIS ARTICLE, OTHER THAN OPERATING AN ADULT BOOKSTORE WITHOUT A LICENSE; OR

(b) ANY STATE LAW LISTED IN § 58-6 A(8) OF THIS ARTICLE.

SECTION 58-8. ADDITIONAL REQUIREMENTS FOR CERTAIN BOOKSTORES.

A. A PERSON WHO OWNS OR OPERATES AN ADULT BOOKSTORE THAT INCLUDES A VIEWING BOOTH OR AN ADULT THEATER:

(1) SHALL MAINTAIN AT LEAST 1 MANAGER'S STATION **NOT EXCEEDING 32 SQUARE FEET OF FLOOR SPACE** IN THE BOOKSTORE;

(2) SHALL NOT ALTER THE LOCATION OR CONFIGURATION OF A MANAGER'S STATION WITHOUT THE APPROVAL OF THE DEPARTMENT;

(3) SHALL ENSURE THAT AT LEAST ONE EMPLOYEE IS ON DUTY AT EACH MANAGER'S STATION WHEN A CUSTOMER IS IN THE BOOKSTORE;

(4) SHALL ARRANGE THE BOOKSTORE'S INTERIOR SO THAT EACH AREA OF THE BOOKSTORE OPEN TO CUSTOMERS, EXCEPT THE RESTROOMS, IS VISIBLE FROM AT LEAST ONE MANAGER'S STATION;

(5) SHALL ENSURE THAT THE BOOKSTORE IS EQUIPPED WITH OVERHEAD LIGHTING OF SUFFICIENT INTENSITY TO LIGHT EACH AREA OF THE BOOKSTORE IN WHICH CUSTOMERS ARE PERMITTED AT AN ILLUMINATION OF AT LEAST **1 FOOTCANDLE** *5 FOOTCANDLES*, MEASURED AT FLOOR LEVEL;

(6) SHALL ENSURE THAT THE LIGHTING IS ON WHEN A CUSTOMER IS IN THE BOOKSTORE;

(7) SHALL NOT EQUIP A VIEWING BOOTH WITH A CURTAIN, DOOR, OR ANY OTHER DEVICE THAT ALLOWS THE BOOTH'S INTERIOR TO BE SCREENED FROM THE VIEW OF EMPLOYEES; *AND*

(8) SHALL ENSURE THAT EACH VIEWING BOOTH IS SEPARATED FROM OTHERS BY A SOLID WALL OR OTHER SOLID **PARTITION; AND** *PARTITION.*

(9) SHALL:

(a) ISSUE A TICKET TO EACH CUSTOMER WHO USES A VIEWING BOOTH OR ADULT THEATER;

(b) RETAIN A PORTION OF THE TICKET FOR THE BOOKSTORE'S RECORDS; AND

(c) MAINTAIN THE PORTION OF THE TICKET RETAINED FOR AT LEAST 2 YEARS.

SECTION 58-9. LOCATION OF ADULT BOOKSTORES.

A. A PERSON SHALL NOT OPERATE AN ADULT BOOKSTORE WITHIN 1,000 FEET OF:

(1) A HOUSE OF WORSHIP;

(2) A PUBLIC OR PRIVATE ELEMENTARY OR SECONDARY SCHOOL;

(3) A PUBLIC PARK;

(4) A CHILD CARE HOME, CHILD CARE INSTITUTION, OR FAMILY DAY CARE HOME LICENSED OR REGISTERED UNDER MARYLAND LAW; OR

(5) A LOT DEVOTED TO RESIDENTIAL USE.

B. A PERSON SHALL NOT OPERATE OR SUBSTANTIALLY ENLARGE AN ADULT BOOKSTORE LOCATED WITHIN 1,000 FEET OF ANOTHER ADULT BOOKSTORE.

C. FOR THE PURPOSES OF THIS SECTION DISTANCE SHALL BE MEASURED IN A STRAIGHT LINE, WITHOUT REGARD TO INTERVENING OBJECTS, FROM THE CLOSEST PART OF THE BUILDING IN WHICH THE ADULT BOOKSTORE IS HOUSED TO THE NEAREST PROPERTY LINE OF THE HOUSE OF WORSHIP, SCHOOL, PARK, CHILD CARE HOME, CHILD CARE INSTITUTION, FAMILY DAY CARE HOME, RESIDENTIAL LOT, OR OTHER ADULT BOOKSTORE.

D. IF THE OPERATOR OF AN ADULT BOOKSTORE HAS A LICENSE FROM THE DEPARTMENT TO OPERATE THE BOOKSTORE, THE OPERATOR

IS NOT PLACED IN VIOLATION OF THIS SECTION BY THE SUBSEQUENT LOCATION OF A HOUSE OF WORSHIP, SCHOOL, PARK, CHILD CARE HOME, CHILD CARE INSTITUTION, FAMILY DAY CARE HOME, OR RESIDENTIAL LOT WITHIN 1,000 FEET OF THE BOOKSTORE.

E. SUBSECTIONS A AND B OF THIS SECTION DO NOT APPLY TO AN ADULT BOOKSTORE THAT:

(1) WAS IN OPERATION ON JANUARY 31, 1992; AND

(2) CONTINUES IN OPERATION AT THE SAME LOCATON AFTER JANUARY 31, 1992, REGARDLESS OF WHETHER OWNERSHIP OF THE BOOKSTORE IS TRANSFERRED AFTER THAT DATE.

SECTION 58-10. APPEAL OF LICENSE DENIAL, SUSPENSION, OR REVOCATION.

IF THE DEPARTMENT DENIES AN APPLICATION FOR A LICENSE OR SUSPENDS OR REVOKES A LICENSE, THE APPLICANT OR LICENSEE MAY APPEAL THE DEPARTMENT'S DECISION TO THE CIRCUIT COURT FOR HARFORD COUNTY.

SECTION 58-11. INJUNCTION.

A. THE COUNTY ATTORNEY MAY SUE TO ENJOIN A PERSON FROM:

(1) OPERATING AN ADULT BOOKSTORE WITHOUT A LICENSE;

(2) OPERATING AN ADULT BOOKSTORE WITH A SUSPENDED LICENSE;

(3) OPERATING AN ADULT BOOKSTORE AFTER A LICENSE HAS BEEN REVOKED; OR

(4) COMMITTING ANY OTHER VIOLATION OF THIS ARTICLE.

B. BEFORE THE COUNTY ATTORNEY FILES SUIT UNDER THIS SECTION, THE DEPARTMENT SHALL NOTIFY THE PERSON WHO OPERATES THE ADULT BOOKSTORE THAT THE PERSON IS IN VIOLATION OF THIS ARTICLE.

C. THE NOTICE REQUIRED BY THIS SECTION SHALL BE IN WRITING AND MAY BE SENT BY CERTIFIED MAIL OR DELIVERED IN PERSON.

Section [58-2. Violations and Penalties.] **58-12. OBSCENE PUBLIC PERFORMANCE.**

[A.] Any person who as actor, dancer, owner, manager, producer, director or agent or in any other capacity prepares, gives, directs, presents, performs or participates in any obscene performance, exhibition, drama, play, show, dancing exhibition, tableau or entertainment in which live persons perform or participate in an obscene manner in the presence of any other person or persons who have paid a consideration of any type whatsoever, to observe the exhibition or performance and every owner, lessee or manager of any theater, garden, building, room, place or structure who knowingly permits the same to be used for the purpose of any such exhibition as enumerated in this section or who assents to its use for any such purpose shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined or imprisoned as provided hereafter.

[B. Any person violating any provision of this chapter or failing to comply therewith is guilty of a misdemeanor, punishable, upon conviction, by a fine not to exceed one thousand dollars ($1,000.) or by imprisonment not to exceed six (6) months, or by both such fine and

imprisonment. Each day that a violation continues is deemed to be a separate offense.]

SECTION 58-13. PENALTIES FOR VIOLATION.

A PERSON WHO VIOLATES ANY PROVISION OF THIS ARTICLE IS GUILTY OF A MISDEMEANOR AND ON CONVICTION IS SUBJECT TO A FINE NOT EXCEEDING $1,000 OR IMPRISONMENT NOT EXCEEDING 6 MONTHS OR BOTH. EACH DAY A VIOLATION CONTINUES IS A SEPARATE OFFENSE.

Section 2. And Be It Further Enacted, That the operator of an adult bookstore open for business on or before the effective date of this Act shall apply for an adult bookstore license under this Act within 45 calendar days after the effective date of this Act.

Section 3. And Be It Further Enacted, That if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any application of this Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

Section 4. And Be It Further Enacted, That this Act shall take effect 60 calendar days from the date it becomes law. EFFECTIVE:

BY THE COUNCIL

BILL NO. 92-27 As Amended

Read the third time.

Passed: LSD 92-13 (May 5, 1992)

Failed of Passage: _____

By Order

/s/ Doris Poulsen, Secretary

Sealed with the County Seal and presented to the County Executive for her approval this 6th day of May, 1992 at 3:00 o'clock P.M.

/s/ Doris Poulsen, Secretary

[County Seal]

BY THE EXECUTIVE

APPROVED: /s/ Eileen M. Rehrmann
County Executive
Date May 11, 1992

BY THE COUNCIL

This Bill, (No. 92-27 As Amended), having been approved by the County Executive and returned to the Council, becomes law on May 11, 1992.

/s/ Doris Poulsen, Secretary

EFFECTIVE DATE: July 10, 1992

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
NOV 3 1995
CLERK

No. 95-552

In The

Supreme Court of the United States

October Term, 1995

HARFORD COUNTY, MARYLAND,

Petitioner,

vs.

CHESAPEAKE B & M, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

HOWARD J. SCHULMAN
Counsel of Record
SCHULMAN & KAUFMAN, LLC
Attorneys for Respondent
100 Light Street, Suite 700
Baltimore, Maryland 21202
(410) 576-0400

7709
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

20 pp

QUESTIONS PRESENTED[1]

1. Must a county ordinance provide for prompt judicial review in order to satisfy the free speech requirements of the First Amendment when the ordinance confers only ministerial discretion upon the licensor and is designed to protect the health, safety and welfare of its citizens by minimizing the undesirable secondary effects generally associated with an adult bookstore?

2. If the county ordinance must expressly provide for prompt judicial

---

[1]Chesapeake B & M, Inc. has no parent, subsidiary or affiliated companies or corporations.

review, is that requirement satisfied if the ordinance affords a prompt exit from the administrative licensing system and an avenue of immediate appeal of that decision to the judiciary, or must the ordinance also provide for prompt completion of the judicial process in order to satisfy the procedural safeguards required under the First Amendment?

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HARFORD COUNTY, MARYLAND,

Petitioner,

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CHESAPEAKE B & M, INC.,

Respondent.

Petition for Writ of Certiorari to the
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For the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The District Court found that the county ordinance unconstitutional because it lacked specific time limitations for the administrative process and that the

administrative process could be delayed indefinitely. (Apx. 12a & n6, 46a-49a). The District Court held that the County had no obligation to set time limits on judicial review. (Apx. 51a). Respondent appealed. The County did not cross-appeal. Relying on 11126 Baltimore Boulevard v. Prince George's County, 58 F.3d 988 (4th Cir. 1995), cert. pending (No. 95-550), the Fourth Circuit held that County did not provide for prompt judicial review that is necessary to guard against the abridgement of protected speech. (Apx.8a-9a, 12a, 17a). The Fourth Circuit did not address the first issue, in the fashion framed by the County.

REASONS FOR DENYING THE WRIT

1. **THE COURT HAS DENIED THIS TERM A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT ON THE SAME ISSUE.**

The Court has already denied the

Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit in No. 95-203 on the issue of:

> Whether "prompt judicial review" of administrative licensing decisions for First Amendment activities, and particularly for licensing decisions pursuant to Memphis' adult business licensing ordinance, is satisfied by providing access to a state court appeal within a specified time (as the First, Fifth, and Seventh Circuit ruled), or must the actual adjudication be completed within a specified time (as ruled by the Fourth and Sixth Circuits).

See City of Memphis v. East Brooks Books, Inc., 48 F.3d 22, 224-25 (6th Cir. 1995) (a three to five month wait for administrative hearing did not meet this court's mandate for prompt judicial review).

2. **THE FOURTH CIRCUIT'S OPINION IS IN HARMONY WITH THE DECISIONS OF THIS COURT.**

The Fourth Circuit, following the principles enunciated in Freedman v.

Maryland, 380 U.S. 51 (1965) and in FW/PBS, Inc., TBA Paris Adult Book Store II v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), concluded the petitioner did not provide for prompt judicial review that is necessary to guard against the abridgement of protected speech. See also Kingsley Books, Inc. v. Brown, 357 U.S. 436 (1957)(by contrast to the Maryland Procedure in Freedman that failed to pass constitutional mustard, a New York statute intended to prevent the sale of obscene books in requiring a trial one day after joinder of the issues and resolution within two days after the trial, was constitutional); United States v. Thirty-Seven Photos, 402 U.S. 363, 374 (1971) (reasonableness of the time period during which a restraint on speech may operate

prior to judicial review "may vary in different contexts"; a Federal statute imposing a prior restraint to require that judicial review be sought within 14 days and concluding that delays between 40 days and 6 months could not be sanctioned).

The judgment of the Fourth Circuit was consistent with Freedman, 380 U.S., at 55, 59-60 (four months initial judicial review followed by six months on appeal, not prompt judicial review); Southeastern Promotions Limited v. Conrad, 420 U.S. 456, 560-61 (1975)(judicial review 5 months later); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 690 n.22 (1968)(holding prompt judicial review was assured by provisions requiring a judicial determination within 9 days of the decision of the administrative body); Bantam Books, Inc. v. Sullivan, 372 U.S.

58, 70 (1963)(noting that prior restraint on speech "tolerated...only where it...assured an almost immediate judicial determination of the validity of the restraint").

The Fourth Circuit's decision is clearly consistent with this Court's prior restraint analysis. The Court in FW/PBS addressed the two constitutional evils associated with prior restraints:

> While "[p]rior restraints are not unconstitutional per se... [a]ny system of prior restraint ...comes to this Court bearing a heavy presumption against its constitutional validity." Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. 'It is settled by a long line of recent decisions of this Court that an ordinance which. . . makes the peaceful enjoyment of freedoms which the Constitution

> guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'"
>
> Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. . . . Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. . . . [T]his Court [has] held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compel[led] the speaker's silence." Id., 493 U.S., at 225-226. (Citations omitted, emphasis added).

The Court then went on to conclude that the Dallas ordinance provided "no means by which an applicant may ensure that the

business is inspected within the 30-day time period within which the license is purportedly to be issued if approved" or obtain prompt judicial review. Id., 493 U.S., at 227.

3. THERE IS NO IMPORTANT QUESTION RAISED REQUIRING REVIEW OF ANY ALLEGED CONFLICT BETWEEN THE CIRCUITS.

Like the regulatory scheme in FW/PBS, the administrative process allows indefinite postponement of the issuance of a license and is invalid without further analysis under the holding in FW/PBS. Redner v. Dean, 29 F.3d 1495 (11th Cir. 1994), cert. denied, 115 S.Ct. 1697 (1995)(an adult bookstore ordinance was inadequate under any interpretation of prompt judicial review, because it created a risk that expressive activity could be suppressed indefinitely in the administrative phase prior to a judicial

review of a decision to deny a license). Given this record, there is no reason to revisit FW/PBS after such a relatively short period of time; and, none has been offered.

4. THE OPINION IS NOT IN CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS.

The County relies upon TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705 (5th Cir. 1994), as an opinion of another circuit with which the Opinion in this case conflicts. There, the Fifth Circuit found that the County regulation failed to assure maintenance of the status quo while processing an application for a license by a business existing when the County adopted its regulation. The licensing scheme in question required the County to issue or deny an application within 60 days, and the Court held that the 60 days

for acting on a license application imposed no undue burden on the adult bookstore applicant. To the bookstore's objection that the order did not provide prompt judicial review or an automatic stay of an order denying a license, the Court noted that the filing of a notice of appeal to the state court stayed any administrative decision revoking or suspending a license. Id., at 709.

Petitioner points to Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993), which construed an ordinance governing the right to obtain a license to build a structure and operate a newsstand on public property. The main opinion of the five judges only noted that it was an open question whether the procedural protection of Freedman was necessary in an ordinance that regulates the building of newsstands

on public property and seven of the judges who wrote to concur or dissent all indicated their disagreement with the mere availability of prompt judicial review to satisfy this court's requirement of prompt judicial review. Id., at 1330-1336, see also Graff v. City of Chicago, 9 F.3d 1309, 1330-1336 (7th Cir. 1993)(In Banc)(Flaum & Cudahy, J.J., concurring) (Ripple, Cudahy & Rovner, J.J., separately concurring)(Cummings, Bauer & Fairchild, dissenting).

Likewise, Jews for Jesus, Inc. v. Mass. Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993) was not an adult bookstore case in that it involved assessment of Transit Authority regulations, not a licensing scheme. The persons contacted the authority by telephone and requested and received

permission to engage in non-commercial expressive activity on a first-come-first-served basis; and, if persons were denied authorization in one location, they were permitted to seek to use a different location or to reserve a different time. The court did not hold that access to a court meant proper judicial review. The court found that the authorization requirement was not open to the kind of arbitrary application that this court has determined as inherently inconsistent with a valid time, place and amount of regulation. It held that analysis under Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1991) was the appropriate standard.

5. THE COUNTY MISINTERPRETS THE OPINION OF THE COURT OF APPEALS IN THIS CASE.

In 11126 Baltimore Boulevard v.

Prince George's County, 684 F.Supp. 884 (D.Md. 1988),[2] rev'd 886 F.2d 1415 (4th Cir. 1989), vacated and remanded, 496 U.S. 901, 110 S.Ct. 2580 (1990), appeal dismissed as moot, 924 F.2d 557 (1991), cert. denied, 502 U.S. 819 (1991), this Court ordered that the judgment of the Court of Appeals be vacated and remanded for further consideration in light of FW/PBS, Inc. The County, however, states that the decision of the Court of Appeals in the instant case is in conflict with the Fourth Circuit's decision in 11126 Baltimore Blvd. v. Prince George's County, Md., ("Warwick I") 886 F.2d, at 1428n.8. This argument, however, is made without reference to this Court's order that vacated the judgment of the Court of

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[2] The designation APX refers to the pages of the Appendix.

Appeals and directed it to reassess its judgment in light of FW/PBS. 11126 Baltimore Boulevard v. Prince George's County, 496 U.S. 901. It overlooks that Warwick I has no precedential value and is null and void on the point in issue in this case. See Black's Law Dictionary (6th ed. 1990), at 1548 ("vacate" defined).

CONCLUSION

The Petition for Certiorari should be denied.

HOWARD J. SCHULMAN
Counsel of Record
Schulman & Kaufman, LLC
100 Light Street, Suite 700
Baltimore, Maryland 21202
(410) 576-0400